Merrill Iron and Steel, Inc. *and* United Paperworkers International Union, AFL–CIO. Case 18–CA–15009

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On December 1, 1999, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions. The Respondent filed a reply brief to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross exceptions, and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions, as explained below, and to adopt the recommended Order as modified.[2]

We adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act when Paul Wisniewski, the fabrication superintendent, threatened employee Jim Lang on May 4, 1998.[3] We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act in its selection of four union activists—Clifford Cleveland, Ronald Dotseth, Jeff Radish, and Michael White—for permanent layoff on September 22, 1998, in order to retaliate against them for their union support and activism and to discourage other employees from doing so in the future. While we agree with the judge's ultimate conclusions as to these 8(a)(3) violations, we do not adopt his entire rationale as stated below.

1. Facts

The Respondent fabricates agricultural storage equipment and custom steel frames and beams for commercial buildings at its two plants in Merrill and Schofield, Wisconsin. As more fully discussed by the judge, in late April 1998,[4] employees at the Schofield plant contacted the United Paperworkers International Union, AFL–CIO–CLC and began to hold meetings seeking to persuade employees to sign union authorization cards. On July 29, the Union filed a representation petition seeking to represent the Respondent's Merrill and Schofield employees.[5] The campaign culminated in the Union's defeat at the election held on September 3,[6] and the Board issued the certification of results on September 10.

From the start of the Union's organizing campaign, four welders/fabricators at the Respondent's Schofield's facility—Clifford Cleveland, Ronald Dotseth, Jeff Radish, and Michael White—were particularly active union supporters.[7] These four employees solicited union authorization cards, discussed the benefits of unionizing with their coworkers, distributed handbills and/or displayed union stickers, and wore union hats at work. Superintendent Wisniewski admitted that the Respondent had knowledge of these four employees' union support.[8] Indeed, Wisniewski testified that he discussed the union activity of "every individual on a specific one on one basis" with other management officials of the Respondent, including Plant Superintendent Tim Gruling and Human Resources Director Lance Rick.[9]

Early in the Union's campaign, on May 4, employee Jim Lang discussed a welding issue with Dotseth while the two were working. After the conversation concluded and Dotseth left, Wisniewski approached Lang and asked him what was going on. After Lang described his conversation with Dotseth, Wisniewski instructed Lang not

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[3] The Respondent excepts, inter alia, to the judge's findings that this allegation was not barred by Sec. 10(b) of the Act, which provides for a 6-month limitations period for the filing of unfair labor practice charges. We find no merit in this exception and agree with the judge that the Respondent waived any timeliness defense. While the General Counsel had alleged in the complaint that Wisniewski's statement occurred "in about August," the Respondent clearly had the opportunity and obligation to make the 10(b) argument at the hearing, once General Counsel witness Jim Lang testified that his conversation occurred on May 4, 1998, 1 day beyond the 6-month limitations period for the November 5, 1998 charge. See *Taft Broadcasting Co.*, 264 NLRB 185, 190–191 (1982), petition dismissed mem. 712 F.2d 1418 (11th Cir. 1983) (where issue of timeliness of charge not raised at hearing and employer was aware of underlying facts at hearing, employer's failure to raise 10(b) defense at hearing is waiver). Accord: *NLRB v. Western Temporary Services*, 821 F.2d 1258, 1264 (7th Cir. 1987) (affirmative defense based on lack of prior notice must be made within reasonable period after party becomes aware of default).

[4] All dates hereafter refer to 1998, unless otherwise stated.

[5] The Union had originally filed a petition for representation on May 29, but requested a withdrawal of this petition and later filed the July petition.

[6] The tally of ballots showed 33 for and 96 votes against union representation, with 5 nondeterminative challenge ballots.

[7] The judge found that there was no evidence that any Merrill facility employee was active on behalf of the Union.

[8] The judge mistakenly noted that Wisniewski was unaware of Ronald Dotseth's union sympathies. In his testimony at the hearing, Wisniewski clearly acknowledged that he saw Dotseth with prounion stickers on his hat and lunchbox before his layoff.

[9] Neither Gruling nor Rick, the son-in-law of the company president, testified at the hearing.

to ask Dotseth questions because Dotseth was "one of the union organizers and that [Wisniewski] figured he was going to be the union president if the [U]nion went through." According to Lang's credited testimony, Wisniewski added, "that's not going to happen" and that "[Dotseth] would be gone before the vote came."[10]

Less than 2 weeks after the election, during the second week of September, Kenneth Hinner—the brother of the company president, Roger E. Hinner Jr.—approached employee Kurt Tress and began speaking with him.[11] Kenneth Hinner, who worked as a groundskeeper and operated a machine on the plant floor, did not hold a supervisory or managerial position at the company. However, as a member of the Respondent's board of directors, he attended board meetings and was entitled to vote on matters considered by the board. In his conversation with Tress, Hinner stated, "well, Kurt, we're going to take care of problems." When Tress inquired what problems Hinner was referring to, Hinner replied that the Respondent was "going to have a layoff that Friday" and that they were going to "get rid of some of the fuckin' union sympathizers."[12] When Tress later reported Hinner's statements to Plant Superintendent Tim Gruling, Gruling replied that he would "take care of it." Later that day, Human Resources Director Lance Rick approached Tress and told him "not to worry about the situation" and that "Kenny Hinner, although he was on the board of directors, did not set policy." Neither Gruling nor Rick, however, specifically told Tress that the Respondent had no animosity towards union supporters or that Kenneth Hinner had not heard antiunion comments made by the Respondent's officials.

It is undisputed that, by late September, the Respondent was in dire financial condition, having incurred losses in excess of $2.2 million dollars for the year. President Hinner reacted by directing his management teams to cut the maintenance staff by 50 percent and the production staff by 20–30 percent.[13] On Friday, September 18, the Respondent ordered Gary Rajek and Dan Hauch, the maintenance department supervisors, to complete an "employee assessment" of all its maintenance employees, ranking each of its employees in relation to each other employee. Rather than relying on the employee evaluations that had been completed in July only 2 months prior to the layoff,[14] the Respondent devised a new assessment form which rated employees on a scale from 1 (distinguished) to 5 (unsatisfactory) on the basis of nine criteria.[15] Later that day, the Respondent permanently laid off the four lowest ranked maintenance employees (out of a total of 11).[16]

On the following Tuesday, September 21, the Respondent ordered employee assessment forms to be completed for all 97 production employees, who worked in production areas called "bays" at the Schofield facility. However, the Respondent decided to confine the pool of production employees for layoff to bays 1 and 2.[17] Rather than using department supervisors to evaluate employees in bays 1 and 2, as the Respondent had done for the annual July evaluations of the production employees, nonsupervisory leadmen Alan Vandre and Delmar Gumz initially completed the assessment forms for bays 1 and 2 employees. Vandre spent an hour and 15

[10] In adopting the judge's credibility findings regarding Wisniewski's threat to Lang, we do not rely on the judge's finding that "Wisniewski never did deny with particularity" making this threat, and instead made only a "blanket denial." Rather, we rely on the judge's general credibility and demeanor-based assessment of Lang, as well as the fact that he testified adversely to his own interests as a current employee. See *Shop-Rite Supermarket, Inc.*, 231 NLRB 500, 505 fn. 77 (1977).

[11] The judge mistakenly referred to "Tress" as "Truss." Additionally, the judge erroneously stated that Tress was "no longer working for the Respondent by the time of the hearing," when his testimony clearly establishes that he was employed by the Respondent at the time of the hearing.

[12] In discrediting Kenneth Hinner's testimony concerning his remarks to Tress, the judge relied, in part, on Hinner's professed lack of recollection about the conversation. The record, however, shows that Hinner denied making the statement at issue, when questioned about it on direct examination at trial. Thus, in crediting Tress' account of the conversation with Hinner, we rely only on the judge's more general credibility and demeanor-based assessment of Tress, as well as the fact that he was testifying adversely to his own interests as a current employee of the Respondent. See *Shop-Rite Supermarket, Inc*., supra.

[13] The judge implicitly discredited Wisniewski's testimony—i.e., the Respondent instructed him to lay off only 8 to 10 maintenance and production employees—which was at odds with President Hinner's directive. The judge found that there was no credible evidence to support the conclusion that the Respondent modified Hinner's directive to reflect any new developments or changed circumstances.

[14] In the July evaluations, three of the four discriminatees (Cleveland, Radish, and White) had received an overall "positive" rating and all four discriminatees received pay increases in July.

[15] The nine criteria included: quality of workmanship, productivity, skill level, attitude, complying with orders and direction, versatility, supervision required, attendance and tardiness, and works well with others. The judge found that the only material difference between the criteria on the July evaluations and the September assessment is that the assessment contained a category for "Attendance & Tardiness" not found on the evaluation. However, as noted by the judge, employee absences and tardiness were considered and noted on the July evaluations when the evaluators felt that adverse comments about them were warranted.

[16] The General Counsel did not allege that the maintenance employees' layoffs were unlawful.

[17] The judge discredited the Respondent's unsubstantiated claim, as reflected by Wisniewski's testimony, that the business then available to the Respondent in 1998 and the nature of the work ordinarily performed in the Schofield bays warranted restricting the September layoffs to employees then working in bays 1 and 2.

minutes completing eight forms for bay 2 employees, while Gumz spent about 20 minutes to complete nine assessment forms for bay 1 employees. Neither Gumz nor Vandre reviewed any of the company's records, but each instead relied on memory and impression of the employees' work performance. Gumz assigned Dotseth the lowest ranking of the nine bay 2 employees. Vandre assigned Radish, White, and Cleveland the three lowest rankings of the eight bay 1 employees (with employee Tim Wiroll tied with Cleveland for the second to lowest ranking).

Wisniewski and Gruling then reviewed the assessment forms for employees in bays 1 and 2. These supervisors raised the assessment of Wiroll so that the effect was to lower the rankings of Cleveland, Radish, and White in bay 1, while leaving Dotseth with the lowest overall ranking in bay 2. Like Vandre and Gumz, neither Wisniewski nor Gruling consulted any company attendance or other personnel records when reviewing and making these assessments. Based upon these revised assessments, the Respondent chose Cleveland, Dotseth, Radish, and White for the permanent layoff. No other production employee was laid off at that time.

2. Analysis

In this case, the General Counsel did not challenge the lawfulness of the Respondent's business decision that layoffs were warranted in the fall of 1998. Instead, the General Counsel argues that the Respondent unlawfully selected union activists Cleveland, Dotseth, Radish, and White for the layoff. As shown below, we find that the General Counsel's argument has merit.

In a typical 8(a)(3) discrimination case, the evidence must support a reasonable inference that protected concerted activity was a motivating factor in the employer's decision.[18] As the Board explained in *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999) (footnotes omitted):

> Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged the . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action. Accord: *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993). Since employer motivation is a factual question, which rarely will be proved by direct evidence, unlawful motivation may be inferred from the total circumstances proved. *NLRB v. Dorothy Shamrock Coal Co.,* 833 F.2d 1263, 1267 (7th Cir. 1987).

In this case, the General Counsel met his initial burden of proof under the *Wright Line* test. Wisniewski's threat to Lang that the Respondent would terminate known union activist Dotseth is direct evidence of its hostility towards union sympathizers. This threat violated Section 8(a)(1) and is strong evidence of the Respondent's animus, particularly as to Dotseth. See *Greystone Bakery, Inc.,* 327 NLRB 433 fn.1 (1999); *Lemon Drop Inn*, 269 NLRB 1007 (1984), enfd. 752 F.2d 323 (8th Cir. 1985).

Also, Kenneth Hinner's prediction that the company would "take care of problems" by "get[ting] rid of some of the fuckin' union sympathizers" in the week prior to the layoffs is further persuasive evidence of the Respondent's animus. Although Hinner was neither a manager nor a supervisor of the Respondent, his statements are attributable to the Respondent. In *House Calls, Inc*., 304 NLRB 311 (1991), the Board stated:

> Under Board law, the test for agency is whether, under all the circumstances, an employee would reasonably believe that the alleged agent was speaking for management and reflecting company policy. *Lovilia Coal Co.*, 275 NLRB 1358, 1372 (1985). Further, elected or appointed officials of an organization are presumed to be agents of that organization clothed with apparent authority. *Nemacolin Country Club*, 291 NLRB 456, 458 (1988), enfd. 879 F.2d 858 (3d Cir. 1989).

As a voting member of the Respondent's board of directors, Hinner was clearly an agent and in a position to be privy to the Respondent's policy-making decisions.[19] Given Hinner's position on the board of directors, Tress could rea-

[18] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[19] See, e.g., *Nemacolin Country Club*, 291 NLRB 456, 458 (1988), enfd. 879 F.2d 858 (3d Cir. 1989) ("Employees naturally would perceive [board members of the country club's board of governors] as privy to the development and implementation of club policy and, accordingly, their stated views would be taken as in harmony with those of management."); *Escambia River Electric*, 265 NLRB 973, 981 (1982), enfd. 733 F.2d 830 (11th Cir. 1984) ("The National Labor Relations Board has concluded with judicial approval that a member of a corporate board of directors was an agent of the corporation, in light of the control exercised by the board and the limited number of directors," citing *Fort Vancouver Plywood Co.*, 235 NLRB 635, 637 fn. 1 (1978), enfd. as modified 604 F.2d 596 (9th Cir. 1979)).

sonably believe that Hinner's statements reflected the Respondent's views and intentions regarding union supporters.[20] Buttressing that conclusion is the Respondent's failure specifically to deny or repudiate Hinner's statement after Tress reported those statements to management. See *Postal Service*, 240 NLRB 1198, 1203 (1979), enfd. in relevant part 618 F.2d 1249 (8th Cir. 1980).

Further evidence supporting an unlawful motivation is the Respondent's uncontested knowledge of all four discriminatees' union activism, in conjunction with its avowed disapproval of that conduct (as reflected in Wisniewski's and Kenneth Hinner's statements). Indeed, Wisniewski testified that he discussed the union activity of "every individual on a specific one on one basis" with other management officials. Such detailed awareness of the employees' union sympathies is particularly relevant in light of the fact that these were the management officials who participated in the decisions to select the specific production employees for the September layoff.

With the General Counsel having met his initial burden of proof under *Wright Line*, the burden shifted to the Respondent to demonstrate that it would have selected Cleveland, Dotseth, Radish, and White for layoff even in the absence of their protected union activity. We find that the Respondent failed to meet its *Wright Line* burden.

While there is no dispute that the Respondent's underlying decision to institute a layoff in September was motivated by business necessity, that defense does not shield the Respondent from a finding that its selection of these four union supporters for layoff was discriminatorily motivated. The Board has found violations of Section 8(a)(3) and (1) where the employees' union activity was the motivating factor in the selection for layoff even though the employer had valid economic reasons for its decision to implement a layoff.[21] Thus, an examination of the circumstances surrounding the singling out of the four discriminatees for layoff is appropriate here.

As the judge properly found, the Respondent failed to explain the inconsistency between the company president's directive to lay off 20–30 percent of the production staff and the fact that only 4 of the 97 production employees (less than 5 percent) were ultimately selected for layoff. Despite this discrepancy in the number of layoffs implemented, the Respondent claimed that, from an operations standpoint, it had a business need to confine the layoff to those production employees working only in bays 1 and 2 in September, since the expertise of employees in bays 3 and 4 would soon be required to fill upcoming orders. The judge, however, correctly rejected this claim because the record shows that all the production employees were similarly skilled and frequently moved from bay to bay.

The Respondent's defense is further undercut by its decision to adopt a new employee assessment form to evaluate the employees for layoff rather than using its July employee evaluations. The Respondent's key witness, Wisniewski, admitted that the Respondent used the "same criteria" to evaluate employees for the September layoff as it had used for the July evaluations, but he could not explain why it was necessary to construct a new form less than 3 months later. Similarly, the Respondent's witnesses did not explain why the company, for the first time, decided to use leadmen Gumz and Vandre—neither of whom was a supervisor—to assess employees in bays 1 and 2 when only department supervisors had completed evaluations of employees in the past. The judge reasonably inferred that this departure from past practice was a thinly-veiled effort to distance the ultimate decision makers, Wisniewski and Gruling, from the positive July evaluations (and pay raises) awarded to the four discriminatees. This effort failed, however, in light of the fact that Gruling and Wisniewski retained the ultimate right to change the employee assessments, and they, in effect, lowered the rankings of Cleveland, Radish, and White.

Furthermore, the haphazard manner in which these assessments were completed underscores their unreliability. Indeed, as pointed out by the judge, both leadmen admitted to spending very little time (20 minutes; 1 hour, 15 minutes) on the assessments. And, as the judge further noted, neither Gumz nor Vandre consulted any supplemental employee records in completing those assessments. Had they done so, Gumz and Vandre would have noticed that their assessments, in many instances, were

[20] In its brief, the Respondent suggests that Hinner's statements should not be taken seriously because of the effect of a past work accident. However, the judge observed Hinner and did not find him to be lacking in competence as a witness due to any mental incapacity. Furthermore, Hinner's position as a voting member on the board of directors undercuts the Respondent's asserted claim that Hinner's comments should not be taken seriously.

[21] See *Hinkle Metal Supply*, 305 NLRB 522, 523 (1991) ("although the [r]espondent had valid economic reasons for effecting a layoff, its motivating factor for the selection, layoff, and discharge of employees Hall, Waldrop, Wise, Hines, Stephens, and Simmons was their union activities."); *JAMCO*, 294 NLRB 896 (1989), enfd. 927 F.2d 614 (11th Cir. 1991); cert. denied 501 U.S. 1253 (1991) (the employer's decision to implement a layoff was not unlawful, but its selection of certain employees for layoff was discriminatorily motivated in violation of Sec. 8(a)(3) and (1) of the Act); and *Sumco Mfg. Co.*, 251 NLRB 427 (1980), enfd. 678 F.2d 46 (6th Cir. 1982) (while the layoff of employees was prompted by a large inventory and a slowdown in orders, the selection of certain employees for layoff was discriminatorily motivated in violation of Sec. 8(a)(3) and (1) of the Act).

completely unsupported by the employer's own records. For example, as the judge noted, Radish and White, who both received the lowest rating for attendance, each had only two absences (and two tardies for White). On the other hand, the Respondent gave higher ratings for attendance to four other employees who had been absent and tardy more times (between 4 and 10 times) than either Radish or White. Likewise, as discussed fully by the judge, the leadmen failed to adequately explain or justify the low ratings given to the discriminatees in other areas. Finally, Superintendents Gruling and Wisniewski perpetuated the problem by failing to consult company attendance and performance records to correct the leadmen's inconsistencies.

All of the above factors—the number of actual layoffs implemented, the lack of justification for restricting the layoffs to bays 1 and 2, and the unreliable September employee assessments—reveal that the Respondent utilized its dire financial condition in September 1998 as a means to rid itself of four known union supporters. [22] Thus, we agree with the judge's conclusion that the Respondent failed to establish that the layoffs of Cleveland, Dotseth, Radish, and White would have occurred in the absence of their protected union activity. Accordingly, we find that the General Counsel has proved by a preponderance of the evidence that the Respondent violated Section 8(a)(3) and (1) of the Act in its selection of employees Cleveland, Dotseth, Radish, and White for the September 22 layoff.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Merrill Iron and Steel, Inc., Schofield, Wisconsin, their officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

[22] The Respondent attempts, in part, to rebut the evidence that its selection of the four union activists was discriminatorily motivated by attacking that portion of the judge's decision that appears to take issue with the underlying layoff decision itself. For example, the judge appears to question the legitimacy of the Respondent's decision to undertake the layoffs, noting: (1) the abrupt timing of the layoff at the beginning of the pay period, (2) the fact that new rework orders and anticipated contracts were coming in, (3) the fact that many production employees performed overtime after the layoffs took effect, (4) the fact that the production employees were busy on the days prior to the layoff, and (5) the hiring of new production employees in the months after the layoffs. We do not rely on such evidence in reaching our decision because, as noted above, the General Counsel did not allege that the layoff decision itself was unlawful.

Florence I. Brammer, appearing for the General Counsel.

Marty R. Howard, and with him on brief, *Bruce F. Mills (Krukowski & Costello, S.C.),* of Milwaukee, Wisconsin, appearing for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Wausau, Wisconsin, from June 8 to 10, 1999. On December 30, 1998,[1] the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on September 29 and amended on November 5, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs which have been filed, and upon my observation of the demeanor, I make the following findings of fact and conclusions of law.

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The principal allegation in this case is that four production employees—welder/fabricator Ronald G. Dotseth, welder/ fabriccator I Jeff Radish, and welder/fabricators II Michael L. White Sr., and Clifford Cleveland Sr.—were permanently laid off on September 22 for the unlawful motives of retaliating against them for past activities on behalf of and in support of a union and, also, to discourage such conduct by employees. In support of those alleged unlawful motivations, but also as an independent alleged violation of the Act, in addition it is alleged that a fabrication superintendent unlawfully threatened employees by telling them that he intended to get rid of union organizers before any union came about.

The employer—Merrill Iron and Steel, Inc. (Respondent)—denies those allegations: denies that the unlawful threat had been made and denies having been motivated by any statutorily-proscribed motive when making the decision to select the four above-named employees for permanent layoff. Rather, Respondent contends that it had legitimate economic reasons which necessitated a reduction in its employee complement and, consistent with that overall objective, had selected Dotseth, White, Cleveland, and Radish for layoff based upon no reason other than their job performances relative to the job performances of other production employees.

[1] Unless otherwise stated, all dates occurred during 1998.

As must be evident from what has been said above, the ultimate determination which must be made in connection with the four layoffs is Respondent's actual motivation for them. See, e.g., *Schaeff Inc.*, 321 NLRB 202, 210 (1996), enfd. 113 F.3d 264 (D.C. Cir. 1997), and cases cited therein. More specifically, at issue is the actual motivation of the official(s) who made the decision(s) to take the action(s) alleged to have been unlawful. *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), enfd. mem. 698 F.2d 1231 (9th Cir. 1982). "The state of mind of the company officials who made the decision . . . reflects the company's motive for" the allegedly discriminatory act(s). *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 336 (5th Cir. 1980).

Absent admission of unlawful motivation, motivation determination is made under what has come to be called the *Wright Line* methodology for analysis. See discussion and cases cited in *Carleton College*, 328 NLRB 217, 219 (1999). As described in subsection C below, and as discussed in section II, infra, the General Counsel has shown that the four alleged discriminatees were union activists and that Respondent knew as much. The fabrication superintendent's unlawful threat is some evidence of animus and, beyond that, other circumstances support a conclusion of animus which, of course, can be inferred. *Alldata Corp.*, 327 NLRB 127 fn. 2 (1998). See also, *Concepts & Designs*, 318 NLRB 948, 954 (1995), enfd. 101 F.3d 1243 (8th Cir. 1996), and case cited therein.

Not only does the totality of the evidence support at least an inference of animus but, as well, it discloses several objective factors tending to establish unlawful motivation, such as the fact that all four production employees laid off had been union activists and supporters, the facts that the layoffs occurred at a time shortly after completion of representation proceedings and, in addition, abruptly near the beginning of a pay period, and the fact that never before in its history had Respondent permanently laid off an employee due to lack of work. See discussion and cases cited in *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997).

In an effort to satisfy its burden of going forward with a showing of legitimate business-related reasons for those permanent layoffs, in turn, as described in subsections D and E below, Respondent presented evidence of a deteriorating financial situation by September. The existence, in fact, of that adverse situation cannot be seriously challenged. Yet, a respondent does not satisfy that burden merely by presenting evidence that legitimate reasons existed for taking action(s) alleged to have been unlawfully motivated. "The mere presence of legitimate business reasons for [an alleged discriminatory action] does not preclude the finding of discrimination." *J.P. Stevens & Co.. v. NLRB*, 638 F.2d 676 (4th Cir. 1980). See also, *Handicabs, Inc.,* supra, 318 NLRB at 894, and cases cited therein.

That is so because "the policy and protection provided by the . . . Act does not allow the employers to substitute 'good' reason for 'real' reasons," *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (7th Cir. 1991). "Rather, the Respondent must affirmatively show that such action would have been taken in any event." *Becker Group, Inc.*, 329 NLRB 103 105 (1999), citing *Hicks Oil & Hickgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). In other words, consistent with what has been said four paragraphs above, a respondent must show that the legitimate reasons advanced as a defense were, in fact, the actual reasons for having taken action(s) alleged to have been discriminatorily motivated.

That means that defenses of legitimate motivation must be evaluated more than casually, to ascertain whether they truly were the actual reason(s) for such allegedly unlawful actions. "While it is a truism that management makes management decisions, not the Board . . . it remains the Board's role, subject to our deferential review, to determine whether management's proffered reasons were its actual ones." *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

The foregoing principles have particular pertinence to the situation presented by the evidence in this case. In an effort to satisfy its burden of going forward, as described in subsections D and E below, and as discussed in section II, above, Respondent presented witnesses whose testimonies were sometimes internally contradictory, other times inconsistent with each other's accounts or with objective considerations, many times lacking in corroboration in significant respects, and often leaving unexplained gaps in the overall sequence of events which is important were reliance to be accorded to Respondent's overall defense for selecting the four alleged discriminatees for permanent layoff on September 22. In addition to objectively diminishing the reliability of that defense, those factors serve to reinforce the impression formed, while they were testifying, that Respondent's witnesses were attempting to tailor their accounts to construct and shore up a defense of legitimacy, rather than to candidly describe what had occurred and reasons for actions taken by Respondent. Therefore, I do not credit the testimony of Respondent's witnesses.

In light of the showing of unlawful motivation by the General Counsel and the absence of credible evidence of legitimate motive for selecting those four production employees for permanent layoff, a preponderance of the credible evidence, viewed in its totality, establishes that the actual reasons for their layoffs had been to retaliate against them for their union support and activism and, also, to discourage other employees from doing so in the future. Therefore, their permanent layoffs violated Section 8(a)(3) and (1) of the Act. Furthermore, I conclude that Respondent's fabrication superintendent did make the unlawful threat, with the result that Respondent violated Section 8(a)(1) of the Act.

B. Respondent's Operations

Founded in 1960 or 1962 by Roger W. Hinner, Respondent is a Wisconsin corporation. For approximately two decades it operated only out of a facility in Merrill, Wisconsin, fabricating overhead grain storage bins and grain handling equipment for mills, seed processing plants, corn drying plants, and similar commercial grain industry operators. As time passed, Roger W. Hinner's children—Bob, Pat, Rick, Kenneth and, most particularly, Roger E. Hinner Jr.—became employed by Respondent, as did his daughter Karen's husband, Gary Rajek.

During the early 1980s Roger E. Hinner Jr. persuaded other family members to branch out the business into custom steel

fabrication of internal steel beams, columns, trusses, and other components for heavy and commercial steel frame buildings. In connection with that aspect of Respondent's business, bids are let for the work by building owners or construction contractors. Prospective bidders must pass prequalification to prove that they have worked on jobs of the required magnitude. Once prequalification is satisfied, the customer's documents and specifications are utilized to prepare a bid which enumerates the cost of materials, detailing and fabrication labor. That last item may be based on the labor cost of similar past jobs or, alternatively, on the estimated labor cost for each specific item—beams, columns, trusses—involved.

A successful bidder's detailers will prepare the design drawings for the project, based upon plans and specifications supplied by the owner or contractor and its architect engineer. The design drawings are submitted for the owner's or contractor's approval. Once approved, fabrication can commence. Roger E. Hinner Jr. estimated that it typically takes 90 days from becoming successful bidder to actually commencing fabrication.

In addition—most importantly, given what occurred during the spring and summer of 1998—an advance bill of materials is prepared. That list includes the steel for the job which, in Respondent's case, is purchased from a mill and cut to specified dimensions, for fabrication, by Respondent's employees. During its custom steel fabrication history Respondent had financed those steel purchases, as well as purchases of other materials, from its own, as Roger E. Hinner Jr. put it, "line of credit with a current lender here in town." Then, Respondent monthly bills customers, as sequences of jobs are completed.

For some years Respondent prospered in custom steel fabrication. By the mid-1980s that aspect was the source of 75 to 80 percent of its overall business operations, with the remainder being agriculture-related operations. Thought began to be given to doubling the size of the Merrill facility to accommodate further increase in custom steel fabrication. However, Roger E. Hinner Jr. discovered that J. I. Case was trying to sell its over 400,000-square-foot facility in nearby Schofield, Wisconsin. Rather than incurring the greater anticipated cost of expanding the Merrill facility, the Hinner family agreed that Respondent would purchase the Schofield one and, then, relocate all of Respondent's operations there, selling or leasing the then-vacated Merrill facility.

The Schofield facility purchase was accomplished by Respondent on December 31, 1994. Because that it was five times the size of the Merrill facility, Roger E. Hinner Jr. arranged to cover some of Respondent's resultant fourfold increase in overhead costs by leasing two-thirds of the Schofield facility vacant space to Warehousing of Wisconsin. Into the remaining vacant space there, Respondent moved its custom steel fabrication operations. It commenced production at Schofield during mid-April 1995.

To perform that by-then expanded Schofield custom steel fabrication, Roger E. Hinner Jr. testified that hiring of employees "was an ongoing process from the time we bought the plant right up until October of last year [1998]—September of last year." He further testified that he began spending half of his work time at Schofield until the office staff was moved there during the spring of 1996. Once that took place, Hinner began working full time at Schofield. At some point thereafter, he became general manager of custom steel fabrication, a position which he apparently occupied thereafter until spring of 1998 when he became Respondent's president. Respondent admits that at all material times while serving as its president, Roger E. Hinner Jr. had been a statutory supervisor and agent of Respondent.

Custom steel fabrication operations at the Schofield facility are conducted in what are called "bays." As will be seen in subsection E below, the allegedly unlawful September 22 permanent layoffs were all made only among employees working in Bays 1 and 2. That very fact is one component of the General Counsel's argument concerning Respondent's motivation. Conversely, Respondent argues that, given the business then available and the nature of the work ordinarily performed in its Schofield bays, it had been logical to select for permanent layoff only among Bays 1 and 2 employees. Accordingly, some understanding of the bays and of the work performed in them is necessary.

Unfortunately, no one supplied a picture or diagram of the Schofield facility operating areas. Thus, any understanding of the positioning of bays and other areas there is left to testimony by various witnesses which, in the final analysis, must be patched together to try understanding where in that facility the various bays are located. As to that testimony, no one disputed the testimony of welder/fabricator Kim Sloan that work on beams is performed in all of the bays. Most of the testimony focused on Bays 1 through 4, but it seems that there are higher numbered ones. For, alleged discriminatee Cleveland testified that he had worked for approximately a month during 1998 "in bay five putting tees together for trusses." And alleged discriminatee Radish testified that he thought there was a Bay 7 where fabrication department employees "take and put—do the layout on the plates, punch holes in them and stuff like that," though he allowed that, "It's a special bay number but there was a couple bays that kind of switched back and forth up there so I think it might have been bay four but I'm not sure."

The only other descriptive testimony about Bay 4 was provided by Fabrication Superintendent Edwin Paul Wisniewski, an admitted statutory supervisor and agent of Respondent. He testified that fabricated material is blasted and painted at the back end of the Schofield facility, after which it is "put on trucks and sent out." He placed Bay 4 at the opposite end of that facility: at "the front end" or "the beginning of the plant." That bay, testified Wisniewski, is "where the trusses were fabricated . . . but it was in line with the wheelibrator which has a direct access from the front to the back," so that for material welded and fabricated in Bay 4 "it was a straight shot through and down to the other [back] end" of the Schofield facility—the end where the blasting and painting is performed.

As in other bays, there are cranes in Bay 4. Apparently those are larger than cranes in some other bays. For, in connection with the Havens truss job described in subsection D below, Wisniewski testified, without contradiction, that "the cranes that were in Bay 4 . . . were not small enough to" move the welded and fabricated trusses for that job so that they could be painted.

By contrast, testified Wisniewski, Bay 3's "cranes were big enough to" move "some heavy trusses" for the Havens job to the back area where they would be painted. Alleged discriminatee Cleveland described Bay 3 cranes as being "three ton cranes," which he characterized as not being "very big ones." No one contested Wisniewski's testimony that "the people that are in Bay 3 at the time [of the September 22 permanent layoffs] did a lot of the more difficult work. A lot of the more intricate work that was done on trusses and a lot of our bigger components whether they be plate girders and so on and so forth is primarily done in Bay 3."

Wisniewski characterized Bay 2 as "the center bay" at "the middle production end of the front of the plant," and Bay 1 as "[t]he bay furthest to the west" in the Schofield facility's production area. Because of that location, he further testified, it had not been as feasible to move fabricated material from Bay 1 "way over to the wheelibrator and then getting them painted," as is the fact with steel welded and fabricated in other bays. Yet, Wisniewski never disputed Sloan's testimony that Bay 2 is separated from Bay 3 "by a chain of rollers" and, moreover, that Bays 1 and 2 are separated from each other only by "welding machines" located between those two bays. She further testified that beams can be moved from Bay 1 to Bay 2 on "a small set of rollers that cranes can push across between the bays so that bay two can do the work too" being performed in Bay 1. Unclear is whether it had been to those sets of rollers, between Bays 1 and 2, to which Wisniewski was referring when he testified about "a conveyor that had gone through [Bay 2] that carries a lot of material down from the saws and down to the fab area to be fab'd and welded and taken down to the shipping area."

What is quite clear, according to all witnesses who testified about it, is that columns and larger beams are handled in Bay 1 because it had larger cranes and a bigger drill. For example, alleged discriminatee Dotseth testified, "Bay one did mostly the large structural beams because there was a drill line prior to the beams coming off the drill itself so it was very large structural beams," while Bay 2 employees worked on "trusses to the smaller structural steel. Mostly because they had cranes in that particular bay [which] were only three ton cranes and bay one had the larger cranes to handle the stuff." Similarly, Sloan testified that "there is a bigger drill in bay one so it can handle bigger material" than other bays, though as pointed out in the immediately preceding paragraph, she also testified that work could be exchanged between Bay 1 and Bay 2, using one the bays' cranes to move that material across the roller, from Bay 1 to Bay 2. She acknowledged, however, that work on larger columns and beams is usually performed in Bay 1.

One important point should be highlighted in connection with the foregoing description. Locations in the Schofield facility, and differences in the types of work performed in bays, does not mean that Respondent's welder/fabricators are confined to the bay to which they are nominally assigned. To the contrary, although Wisniewski testified that "more difficult" and "more intricate" projects are performed in Bay 3, and while he further testified that welder/fabricators in Bay 3 were "a close knit group of guys and gals," he acknowledged that welder/fabricators from other bays do "go over there" and work in Bay 3, though only "[v]ery seldom" did they do so. Even so, he conceded that, "All welders that are in the plant are capable of going from one bay to another, correct."

In fact, no official or other witness for Respondent disputed testimony that both Sloan and Radish had spent time working in Bay 3. All witnesses either expressly agreed, or appeared to agree, that welder/fabricators move freely among bays at the Schofield facility. For example, Bay 1 lead person Alan Vandre agreed that movements of welder/fabricators between Bays 1 and 2 occurred on almost a daily basis: "It depends upon if I got more stuff or Bay 2 has got more stuff. Then we got to shift people around." In sum, while Wisniewski testified that "more difficult" and "more intricate" work is performed in Bay 3, where the welder/fabricators are "a close knit group," at no point did Wisniewski or any other witness claim that that Bay 3 group had not been augmented, at least occasionally, by welder/fabricators from other bays and, further, Wisniewski admitted that all of them were capable of working in any of the Schofield bays.

Relocation of custom steel fabrication operations to Schofield permitted Respondent to begin bidding on larger projects. And through 1997 those operations appear to have prospered. During that calendar year it admittedly derived gross revenues in excess of $1 million and, during that same calendar year, it admittedly sold goods valued in excess of $50,000 which were shipped from the Schofield facility directly to points outside of the State of Wisconsin. Based upon those admitted facts, Respondent admits that at all material times it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Nonetheless, its business horizon was not an unclouded one.

C. The Organizing Campaign

On May 29 United Paperworkers International Union, AFL–CIO–CLC (the Union), an admitted labor organization within the meaning of Section 2(5) of the Act, filed a representation petition, in what became Case 18–RC–16299, seeking an election among Respondent's employees. For reasons never explained, possibly because of a deficient showing of interest, the Union requested withdrawal of the petition on June 9. But, on July 29 the Union filed the petition in Case 18–RC–16338, again seeking an election among Respondent's Merrill and Schofield employees. This time an election was conducted, on September 3. A majority of 129 valid ballots were cast against representation by the Union: 33 votes for representation by it; 96 against representation by it, with 5 nondeterminative challenged ballots. No objections were apparently filed to conduct of that election. Its results were certified on September 10.

With respect to employees who were active on behalf of the Union, there is no evidence that any Merrill facility employees had been among them. At Schofield, Radish appears to have been the most active employee. In fact, he may have been the employee who first made contact with the Union. For, he testified that he had spoken with Union agent Vernon Bowers approximately "once a week" and had attended that Union's first meeting with Respondent's employees during April, approximately a month before the first above-mentioned petition had been filed. At work, he testified, Radish had solicited signa-

tures on authorization cards from other employees, had helped handbill outside of the Schofield facility, had worn Union buttons and a Union hat, and had displayed Union stickers on his toolboxes. During the September 3 representation election, Radish served as observer for the Union. Wisniewski admitted that he had known that Radish was a union supporter.

White testified that he had attended his first meeting with the Union during May and had solicited employees' signatures on authorization cards before and after work, as well as during "lunch hour." One person whose signature he had solicited on a card had been Fabrication Superintendent Wisniewski who testified that, "some time" when the first petition had been filed, he had been offered an authorization card by White who asked if he (Wisniewski) wanted to sign it. Thus, as with Radish, there can be no doubt of Respondent's knowledge about White's support for the Union.

Cleveland testified that he had passed out authorization cards which he had been keeping in his toolbox and which "[a] lot of the employees" came during "break or else noon hour" and asked Cleveland to furnish to them. Cleveland testified that he also had affixed one of the Union's insignia on his welding helmet, but "it lasted fifteen minutes and it melted right off."

Cleveland characterized his union activities as having been relatively low-profile. Despite that, Wisniewski admitted that he had known that Cleveland, as well as White, supported the Union. Yet, Wisniewski never did explain how he had become aware of Cleveland's relatively low-profile support for the Union. Nonetheless, Wisniewski's testimony did supply indirect evidence concerning how he likely had learned about Cleveland's Union support.

Wisniewski admitted that, during discussions among management officials, "we had talked about" the ongoing union campaign and, more specifically, "about all of the individuals" who were supporting the Union: "We talked—yes, we talked about every individual on a specific one on one basis." Those admissions are particularly important also with regard to Dotseth's union support.

Radish testified that he had worked with "a few" other employees while campaigning on behalf of the Union. For example, he identified Tom Gumz and Jeff Howland, both of whom had "left before the vote ever came." Others whom he identified were Kim Sloan, Jeff Lang, and alleged discriminatee Dotseth. Dotseth testified that he had solicited employees' signatures on authorization cards, had passed out union literature to "some of the employees," had displayed union stickers on his welding helmet and lunch box and, based upon his prior union experience, had answered other employees' questions about unionization during the approximately 2-month period before the September 3 representation election.

Neither Wisniewski, nor any other witness who testified for Respondent, acknowledged specifically having known about Dotseth's support for the Union and his activities on behalf of it. Yet, given the above-mentioned conversations among management officials, which Wisniewski acknowledged had occurred, it seems unlikely that such activity by Dotseth would have escaped notice by Respondent. In fact, Wisniewski never did deny having known that Dotseth had been one of those supporters of the Union.

Nor did any of Respondent's other witnesses deny having known about Dotseth's support for the Union. Asked about whom the officials had been who had discussed the Union's supporters, "on a specific one on one basis," Wisniewski denied that President Roger E. Hinner Jr. had been one of them. But, he admitted that one "one occasion," during pendency of "the first petition," he and Roger E. Hinner Jr. had conversed about "the fact that the people out the plant were putting up a petition drive to unionize" Respondent. Roger E. Hinner Jr. denied having either known which employees were supporting the Union and, further, denied having discussed with any of his managers or supervisors whom those employees might be.

Wisniewski did identify, as management officials with whom he had discussed employee-supporters of the Union, "on a specific one on one basis," then-Human Resources Director Lance Rick and then-Plant Superintendent Tim Gruling. Neither former official was called as a witness, though it appeared that both were available to Respondent as witnesses. Roger E. Hinner Jr. testified that, as of the time of the hearing, Gruling was employed by Respondent at its Merrill facility and that Lance Rick, the son-in-law of Roger E. Hinner Jr., was working for a company in Plover, Wisconsin. Inasmuch as Respondent knew where they were working, seemingly it could have called them as witnesses. Respondent presented neither evidence nor representation that Gruling or Lance Rick were not available to testify.

Beyond inference of Respondent's knowledge about Dotseth's support for the Union, certain comments were attributed to Wisniewski during which he directly connected Dotseth to the Union and its campaign which led to filing of the initial representation petition. Laid-off maintenance employee Jim Lang testified that, on May 4, he had been discussing a welding problem with Dotseth when Wisniewski came over and asked what was going on. Dotseth walked away and Lang testified that he had explained to Wisniewski that he had been "ask[ing] Ron how he would weld this weldment." In response, testified Lang, Wisniewski said, "I don't ask Ron questions. He [Wisniewski] was the foreman. I should ask him or the leadman," and then added, "I should not be congregating much with Ron because he was one of the union organizers and that he figured he was going to be the union president if the [U]nion went through," but that Wisniewski "intended that's not going to happen. That Ron would be gone before the vote came."

Lang was cross-examined relatively rigorously concerning his testimony about that conversation. During that examination, Lang pretty much confirmed the elements of his above-quoted description of Wisniewski's remarks: "that I should not congregate with Ron too much. He said 'That guy is part of the [U]nion' and he said 'He thinks he is going to be union president' and he says 'I will see that that don't happen.' He says 'Ron will be gone before the vote comes.'" There is no essential contradiction or disparity between Lang's descriptions during direct and cross-examinations about what Wisniewski had said. But, some disparity arose when Lang's testimony is compared with his account of Wisniewski's remarks given in a prehearing written statement.

Lang conceded that his written statement contained no mention of Wisniewski having said that Lang "should not be con-

gregating much with Ron." Aside from that, however, the written statement does state, consistent with Lang's testimony, that Wisniewski had said "that if I have any questions I'm to ask him or the lead person in the area, not Ron, and that Ron was a union organizer that he intended to get rid of before any union comes about." And it is that portion of Wisniewski's remarks that is crucial, since the complaint makes no allegation about not congregating with Dotseth, but alleges only that Respondent violated Section 8(a)(1) of the Act by Wisniewski having said "that he intended to get rid of union organizers before any union came about."

The only disparity between that allegation and Lang's testimony, both during direct and cross-examinations, is whether Wisniewski had said that he intended to get rid of Dotseth "before any union came about" or, instead, "before the vote came" or "comes." In context, such a variance is not so significant as to inherently undermine Lang's credibility, nor to invalidate the Complaint's allegation. Furthermore, given that the Complaint's allegation does not include any mention of ceasing to congregate with Dotseth, the issue of whether or not Wisniewski had made that added statement to Lang is a collateral matter–one pertaining to "a matter not in issue herein," *Philo Lumber Co.*, 236 NLRB 647 fn. 1 (1978), and cases cited therein, and, therefore, one upon which reliance cannot be placed in evaluating Lang's credibility about Wisniewski's actually alleged unlawful statements as described during direct and cross-examinations, and in the prehearing written statement.

In fact, Wisniewski never did deny with particularity having told Lang that he (Wisniewski) intended to get rid of union organizer and would-be union president Dotseth before any union or vote came about. Instead, Wisniewski denied only having participated in a conversation with Lang during which he (Wisniewski) "threatened to get rid of people pushing the [U]nion," and denied only having "threaten[ed] anybody that [Wisniewski] was going to fire the people that were leading the [U]nion charge[.]" Those are only general, or what have been called "blanket," denials. As a matter of law, such denials are not sufficient to refute specific and detailed testimony, such as that provided by Lang concerning Wisniewski's threat to get rid of Dotseth because the latter was a union organizer and would-be president of the Union, should it succeed in becoming the representative of Respondent's employees. See, *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987); *Beaird-Poulan Div. Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981); *Mastercraft Casket Co. v. NLRB*, 881 F.2d 542 (8th Cir. 1989). At no point did Wisniewski deny with specificity having made that threat to Dotseth.

One disparity does exist between the complaint and Lang's testimony with regard to the date of Wisniewski's above-described threat. The complaint alleges that Wisniewski had made that threat during August; Lang testified, repeatedly, that it had occurred on May 4. To overcome that disparity, the argument is advanced that by comparing Lang's testimony with his written statement, it can only be concluded that he eventually did place the date of Wisniewski's threat as having been made during August. However, that is not an accurate argument.

A careful reading of Lang's testimony reveals that he had prepared the written statement "maybe three days after the" remarks by Wisniewski and, then, had written the date "8/14 of '98" on it to reflect "the day I gave this document to Ron" Dotseth. "Yes," Lang answered, he had "drafted [the written statement] earlier and gave it to Ron Dotseth on the 14th of August[.]" That is, the written statement was prepared by Lang, "maybe three days after" Wisniewski's threat and was retained by Lang until August 14 when he gave it to Dotseth, at which point he placed the August 14 date on the written statement. Apparently mistaking that date for the one on which Wisniewski had made his threat to Lang, the General Counsel used "August" – the month during which Lang gave the written statement to Dotseth—in the complaint and feels compelled, despite Lang's testimony that Wisniewski had actually made his threat on May 4, to defend the Complaint's month.

Of itself, disparity in date is not necessarily a material consideration. After all, the threat was litigated fully, as discussed above. See, e.g., *McKenzie Engineering Co. v. NLRB*, 182 F.3d 622 (8th Cir. 1999). But, a latent problem emerges as a result of that disparity. The unfair labor practice charge in this matter was filed on September 29. No mention was made in that charge of any threat or other unlawful statement by any of Respondent's officials; its allegation was confined to the asserted "discriminatory discharge[s]" of the four alleged discriminatees. Allegations of Section 8(a)(1) of the Act were not added until the amended charge was filed on November 5. Of course, May 4 is one day outside of the 6-month limitations period prescribed by the proviso to Section 10(b) of the Act. Essentially, the situation here is the same as that underlying the Board's recent decision in *Ross Stores, Inc.*, 329 NLRB 573 (1999). However, it is not necessary to follow here the analytical approach followed in that case.

Timeliness defenses under Section 10(b)'s proviso are affirmative defenses which are regarded as waived when not timely advanced. See, e.g., *Prestige Ford*, 320 NLRB 1172 fn. 2 (1996). Obviously, Respondent was in no position to raise such a defense in its answer; the complaint alleged an "August" date. After Lang's testimony had been elicited, however, it could have moved to dismiss what by then was an evident time-barred allegation. Beyond that, Respondent could have moved in its posthearing brief to dismiss the allegation, by then disclosed to have been time-barred. Respondent did not do so. Accordingly, any timeliness defense is deemed waived.

Turning to the substance of Wisniewski's threat, Lang appeared to be testifying honestly about having been told of an intention to get rid of Dotseth because the latter was a union organizer who planned to become the Union's president. I credit that testimony by Lang. Obviously, a threat to "get rid of" an employee because of union support and activities, past or prospective, is a threat which naturally interferes with, restrains and coerces an employee to whom such a threat is directed. If Respondent could "get rid of" Dotseth for such activities, that threat conveys an inherent threat that Lang, also, could be gotten rid of for his own union support and activities. In short, a threat to "get rid of" a leading union proponent chills the exercise of statutory rights by the employee, Lang, to whom that threat was made. Given Wisniewski's position as fabrication

superintendent, an employee, such as Lang, would logically conclude that Wisniewski possessed authority to carry out his threat against Dotseth. The coercive impact of that unlawful threat—and the animus which it displays—is not somehow diminished by the fact that it was not carried out prior to the September 3 representation election. Therefore, by virtue of that threat, Respondent violated Section 8(a)(1) of the Act.

D. Respondent's Economic Problems During 1998

Following relocation of custom steel fabrication operations from Merrill to Schofield, Respondent encountered the first of what would become several setbacks. Founder Roger W. Hinner and two of his sons, Pat and Bob, "became very comfortable with staying in Merrill and had no desire to move to Schofield," as Roger E. Hinner Jr. put it tactfully, "which caused a lot of problems." Their attitude left Respondent with agriculture-related operations situated at the Merrill facility. Consequently, it was not able to generate any revenues from the planned lease or sale of that facility. Instead, the Merrill facility remained as an expense item for Respondent.

At Schofield, excess space was left as a result of the decision to leave agriculture-related operations at Merrill. To some extent the cost of that unused Schofield space was ameliorated by additional tenants located by Roger E. Hinner Jr. After Warehousing of Wisconsin's lease expired, and it moved out after 12 to 18 months tenancy in the Schofield facility, he was able to lease space in that facility to Ryerson Steel, Becker Communications and, eventually, Superior Joist. Their tenancy, however, did not overcome additional problems which arose during 1998.

As stated in subsection B above, relocation of custom steel fabrication to Schofield permitted Respondent to bid on larger projects and it did so. During September of 1997 it was selected successful bidder for fabrication of steel on a 1,200,000 square-foot hospital being erected by a firm referred to as Bronson. Under the 90-day timetable described in that subsection, fabrication should have commenced on that job during December of 1997. According to Roger E. Hinner Jr., however, problems with engineering requirements led to a 3-week delay in detailing work and, in fact, he testified that Respondent eventually had "to bring in a larger engineering firm to help us design the connections." As a result, detailing cost $250,000 more than anticipated by Respondent's bid and, moreover, fabrication never did commence until early January 1998.

Once that fabrication did commence there were additional problems which arose. Both shop fabrication errors and production time overruns resulted in additional losses. Meanwhile, on January 10 Respondent had been selected as successful bidder on a similarly large General Motors job. The intention had been to commence work on the General Motors job as the Bronson job was winding down. But, delays in the latter left Respondent unable to commence the General Motors job until sometime during May, approximately 4 months after having received notice of its selection as successful bidder.

In the end, the General Motors job was profitable, but only on a "three or four percent margin," Roger E. Hinner Jr. testified, whereas a "10 percent" profit margin had been anticipated. In contrast, not only did Respondent lose all of its anticipated profit on the Bronson job, but it lost approximately $1 million on that job, he testified.

By August those losses had surfaced in Respondent's newly-started monthly accounting balance sheets. Its fiscal year is February 1 through January 31. The fiscal year ending January 31, 1998, had been a profitable one. So, too, were Respondent's operations profitable during the following February and March. At the end of the latter month, Respondent had earned $134,333.86 during those first 2 months of fiscal 1999. Thereafter, its profitability turned around.

Respondent lost $100,536.05 during April, $140,732.17 during May, $54,470.95 during June, and $839,509.82 during July. Although he testified that he kept apprised weekly on how Respondent's operations were doing financially, Roger E. Hinner Jr. testified that it "took typically 30 days" from preparation of the monthly accounting balance sheet until the time when he saw it. So, as of September 22, when the alleged unlawfully motivated permanent layoffs occurred, he likely would not have known with certainty that Respondent's loss for August had been $1,148,959.44, though he would have known that loss was continuing and, in addition, that it would be for a substantial amount. In any event, the $1,135,248.99 total loss from April through July is hardly insignificant.

That was a conclusion also reached by Respondent's lender. As mentioned in subsection B above, Respondent has been financing its purchases of steel and other materials for jobs through a "line of credit with a current lender here in town," testified Roger E. Hinner Jr. Then, Respondent recovered those costs, as well as its costs of labor, by billing customers monthly, to reflect completion of various sequences of jobs. Confronted with Respondent's 1998 losses, however, its lender pursued three courses. First, it increased the rate of interest which it charged Respondent for loans extended through the line of credit. Second, it cut Respondent's line of credit in half, from $6,500,000 to $3,250,000. That left Respondent without "ability to go out and buy steel and cash flow the business nor pay off vendors," testified Hinner, for the very large custom steel fabrication projects which it had relocated operations to Schofield to be able to perform. Thirdly, the lender tried to persuade Respondent to bifurcate those operations from the still-profitable agriculture-related ones, a course which was eventually followed during October.

President Roger E. Hinner Jr. testified, that confronting the situation described above, "I wondered whether or not we were going to be open by the end—or make it to the end of the year." Thus, Respondent began pursuing steps to minimize its losses. Following early July wage increases resulting from annual evaluations Respondent imposed a wage freeze. Beyond that, after bonuses were awarded to Gruling and two foremen—second-shift Shop Foreman Roger D. Ballerstein and Quality Control Foreman Kyle R. Rahikainen—during the Spring, Respondent discontinued awarding bonuses, save for Gruling once he completed the required number of hours for a previously promised bonus.

Of greatest significance, given the unlawful motivation allegation, was an asserted decision to reduce the Schofield employee-complement. Roger E. Hinner Jr. testified that he had "seen a hole coming up in our production right after the Gen-

eral Motors job," and "throughout the month of September," because "we didn't have adequate work lined up after the General Motors job." As to that job, it is undisputed that Respondent had completed it "[w]ithin one week" of its targeted September 15 completion. In consequence, Hinner testified that he decided to slow production "somewheres between 20 and 25 percent" and "to reduce all of the employment by 20—30 percent," with the maintenance staff to be "cut off . . . in half" and other Schofield departments and areas to be cut "across the board," on the basis of "productivity and performance—general attitude," and with no "rehires." According to Hinner, he "gave directive to my brother, Rick, and Lance [Rick] and Tim Gruling" to implement those directions, after which he (Roger E. Hinner Jr.) did not become further involved in implementing those directions.

Roger E. Hinner Jr. denied specifically that those directives had anything to do with the Union's campaign and, further, denied that he had directed that union activity was to be considered in selecting any employee for layoff. Concededly, this would be the first occasion when Respondent had permanently laid off employees for lack of work. But, Respondent contends that extraordinary steps had been warranted by the situation which confronted Respondent by mid-September. Indeed, that conclusion cannot legitimately be contested. Still, there are certain aspects which give rise to doubt about the legitimacy of Respondent's motivation in connection with the reduction in force which it claims to have pursued in an effort to try to salvage its situation.

Roger E. Hinner Jr. testified that at the time of the September 3 election there had been 108 eligible production and maintenance employees working at the Schofield facility. Yet, Respondent concedes that during September only a total of eight employees had been permanently laid off—four maintenance and four production employees. The inconsistency between his above-mentioned purported permanent layoff directive and the total number of employees actually laid off was pointed out to Roger E. Hinner Jr. While he acknowledged that there was disparity between his purported direction and its implementation, however, Hinner testified only that Respondent ultimately did achieve its targeted reduction of cutting in half the number of maintenance employees and of reducing other staff by "20–30 percent."

So far as the record discloses, Hinner meant that those targets were met over time by attrition. In fact, the evidence does show that Respondent's total Schofield employee-complement did decline significantly during the remainder of 1998 and during the first part of 1999, prior to the hearing. Even so, Respondent's willingness to wait for reduction to occur over time, as a result of attrition, raises the natural question of why it had seen fit to abruptly lay off but eight employees during September and, then, sit back and wait for attrition to accomplish further reduction. That seeming inconsistency—between purported directive for substantial immediate reductions and subsequent willingness to, for the most part, wait for attrition to accomplish reduction in the Schofield employee-complement—was never explained by Respondent.

That situation becomes even more puzzling when the eight September permanent layoffs are more closely examined. As set forth above, Roger E. Hinner Jr. testified that he had decided, and directed, that maintenance staff be "cut off … in half." Prior to the September permanent layoffs, Respondent employed at Schofield three mechanics and eight regular maintenance employees—a total of 11 maintenance employees. But, only four of them were laid off permanently on Friday, September 18. Further, if only the eight regular maintenance employees are considered, isolated from the three mechanics, the results become even more seemingly inconsistent with President Hinner's purported direction. Only two of eight regular maintenance employees—Todd Buelow and Gary Gamble – were permanently laid off on that date, along with mechanics Todd Nienow and Rodney Wallace. No explanation was advanced by Respondent for the disparity between Roger E. Hinner's purported "cut off . . . in half" direction, regarding maintenance employees, and the less than "half" of them who actually were permanently laid off on September 18. Nor, for that matter, did Respondent explain why it had chosen only four of approximately 97 production employees for immediate permanent layoff.

True, there is no allegation that the four maintenance employees' permanent layoffs had been unlawfully motivated. Still, as set forth above, Respondent's defense portrays those layoffs as having been an integral component of an overall directive by Roger E. Hinner Jr. to reduce the Schofield facility employee-complement. So. some consideration of those maintenance layoffs is necessary to evaluate the four production employee-layoffs which, of course, are alleged to have been unlawfully motivated.

Aside from their numbers, the most striking thing about comparison of the maintenance employees' and production employees' permanent layoffs is that those layoffs did not take place simultaneously, as might be expected if they had been no more than related components of a single overall reduction in staff. The four maintenance employees were laid off on Friday, September 18. Based upon Respondent's "YTD Detail P/R Registers," those layoffs were made on the day before the pay period for that week ended on Saturday. So far as the evidence discloses, Saturdays are not regularly scheduled workdays, but rather work occurs on Saturdays only when required by production considerations, and is compensated on an overtime basis.

In contrast, the four alleged discriminatee-production employees were not permanently laid off on September 18 nor, for that matter, at the end of a regular workweek and near the end of a pay period. Rather, they were permanently laid off on a Tuesday, September 22, near the beginning of a pay period. Respondent never explained why, if all eight September permanent layoffs were part of a single decision to effect an overall reduction in Schofield employee-complement—as claimed by Roger E. Hinner Jr.—layoffs of maintenance employees had been separated from those of the production employees. In fact, procedures preceding selection of employees to be laid off gives rise to a further difficulty for Respondent's asserted defense.

As discussed further in subsection E below, the September layoffs were preceded by individual evaluations of each Schofield employee, recorded on "Employee Assessment" forms. Each employee was numerically-rated in nine areas and,

then, ranked relative to other employees in the groups being rated by a particular supervisor or other assessor, such as leadmen.

The significant point at this stage is that employee assessments for maintenance employees were dated September 18 and, accordingly, were apparently prepared on the same day as the four maintenance employees had been laid off. By contrast, assessment forms for production employees, at least for those in Bays 1 and 2 from whom the four production layoffs came, were not even distributed for completion until the afternoon of Monday, September 21. Now, even speculating that some business-related reason might have existed for not laying off the four alleged discriminatee-production employees until Tuesday, September 22, no explanation is even suggested by the evidence for delaying assessment of production employees until the week after assessments had been conducted for maintenance employees.

Absent such an explanation, delayed preparation of those forms for production employees raises some suspicion that it had not occurred to Respondent to assess and layoff production employees until after maintenance employees already had been assessed and four of them laid off. That is, having assessed and laid off maintenance employees, Respondent decided to take advantage of those legitimately-motivated layoffs by extending the procedure utilized for selecting maintenance employees to production employees, as well, with Roger E. Hinner Jr. then trying to disguise that decision by portraying both sets of layoffs as the result of a single directive, albeit a directive which is inconsistent with the actual separation of production from maintenance layoffs.

On the other hand, the evidence is susceptible of a differing inference: that Respondent initially did intend to take advantage of its decision to lay off maintenance employee on Friday, September 18 and layoff on that date, as well, the four alleged discriminatee-production employees, because of their activism on behalf of and support for the Union. But, then, it had to postpone the four production layoffs in light of remarks to an employee by one of the Hinners—remarks which revealed Respondent's actual motivation.

That employee is Kurt Truss. He had been employed by Respondent for several years before departing from its employment prior to the hearing in this matter. Truss testified that, during the years that he had worked for Respondent, he had conversed "[e]very day" with Kenneth Hinner—one of founder Roger W. Hinner's sons and a brother of Roger E. Hinner Jr.—about various subjects. During "about the second week of September," testified Truss, one such conversation had been in progress when Kenneth Hinner suddenly remarked that Respondent was "going to take care of problems" by having a layoff "on Friday" that would "get rid of some of the f___g union sympathizers." Truss testified that he had admonished Kenneth Hinner for making such a statement—"You can't say things like this, especially to me in a union situation"—and, later that day, had reported to then- Plant Superintendent Gruling what Kenneth Hinner had said. Even later that same day, according to Truss, he was approached by then-Human Resources Director Lance Rick who told Truss "not to worry about the situation and that Kenny Hinner although he was on the board of directors did not set policy."

Kenneth Hinner was called as a witness for Respondent. Initially, he denied with specificity having made the above-quoted remarks attributed to him by Truss. But when next asked whether he had "made any statement along those lines to Mr. Truss," Kenneth Hinner appeared to become more guarded. He answered only, "Not that I can recall." Of course, a professed lack of recollection does not constitute refutation. See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 150 (1996), and case cited therein.

As pointed out above, Truss was no longer working for Respondent by the time of the hearing. However, there is no evidence that the circumstances of his departure from Respondent's employment had been such that, viewed from an objective perspective, he likely could be said to be biased against Respondent, such that he might fabricate testimony to place Respondent in an adverse situation. Although Kenneth Hinner denied having made the above-quoted remarks attributed to him by Truss, neither Gruling nor Lance Rick were called to deny that the former had received a report from Truss about such remarks by Kenneth Hinner, nor to deny that Lance Rick had told Truss "not to worry about" remarks made by Kenneth Hinner. In consequence, it is uncontroverted that Truss had told Gruling about the above-quoted remarks made by Kenneth Hinner and, then, that Lance Rick had told Truss "not to worry about" those remarks.

By now, of course, it is settled that testimony is not required to be blindly accepted merely because it is not contradicted. See, e.g., *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (9th Cir. 1953), affd. 346 U.S. 482; *Woods v. United States*, 724 F.2d 1444, 1452 (9th Cir. 1984). Nonetheless, where testimony is uncontradicted, though the opportunity to do so seemingly existed, that very absence of contradiction distinguishes such testimony from that which is controverted. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation." (Citation omitted.) *Missouri Portland Cement Co.v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992).

Truss appeared to be an honest individual who was attempting to testify candidly about what had been said to him and about what he had said on that September day. As an objective matter, there would have been no reason for him to make the above-described undisputed report to Gruling unless Kenneth Hinner actually had made the remarks attributed to him. In like vein, there would have been no reason for Lance Rick to assure Truss that the latter need not worry about remarks by Kenneth Hinner, unless Gruling had reported to Rick what Truss had reported to Gruling. In view of the totality of the foregoing considerations, and his seeming candor when testifying, I credit the account by Truss of what Kenneth Hinner had said.

The parties dispute whether or not Kenneth Hinner—a member of the family who owns and operates Respondent, and during September, at least, a member of Respondent's board of directors and, as well, someone who could co-sign Respondent's checks—had been an agent of Respondent within the meaning of Section 2(13) of the Act. But, resolution of such status is not significant in the circumstances presented by his

remarks to Truss. True, Kenneth Hinner lacked supervisory authority and was not involved in making personnel decisions. He sat on Respondent's board of directors largely as a figurehead. Yet, the crucial point about his remarks to Truss is that a family member so uninvolved in operational and personnel decisions knew enough to make remarks about—indeed, to predict—what eventually occurred: Respondent did permanently lay off—"get rid of"— four of the Union's supporters.

True, Respondent did not take that action on a Friday; it permanently laid off Radish, Cleveland, White, and Dotseth on a Tuesday. Yet, that does not detract from Kenneth Hinner's prediction of what was going to happen to "some . . . union sympathizers." After all, Truss reported to Gruling what Kenneth Hinner had said and then-Director of Human Resources Lance Rick obviously became aware of what Truss had reported to Gruling. To then effect permanent layoff of those four production employees on a Friday would only reinforce the accuracy of what had been said to Truss by Kenneth Hinner. Yet, while that could be a logical explanation for not laying off the four production employees, it was not an explanation which Respondent advanced.

That is, Respondent never contended that it had delayed those four permanent layoffs from Friday, September 18 until Tuesday, September 22 to avoid giving an appearance of unlawful motivation, in light of Truss's report about Kenneth Hinner's remarks. Nor, for that matter, does the evidence supply a basis for inferring that that had been Respondent's purpose for not laying off Radish, Cleveland, White, and Dotseth on September 18, along with the four maintenance employees. Of course, I am not at liberty to supply for Respondent a defense which it has not raised. See, e.g., Norris/O'Bannon, 307 NLRB 1236, 1242 (1992). "The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." Inland Steel Co., 257 NLRB 65, (1981).

Even had Respondent presented testimony that the alleged discriminatee-production employees' permanent layoffs had been deferred from September 18 to September 22, to avoid an appearance of impropriety in light of Kenneth Hinner's remarks to Truss, Respondent's situation would not be salvaged. As mentioned above, "Employee Assessment" forms for production employees, at least for those in Bays 1 and 2 to which the alleged discriminatees had nominally been assigned, were not distributed for rating and ranking until the afternoon of Monday, September 21. Yet, as of "the second week of September"—the workweek of September 14 through 18—according to Truss, Kenneth Hinner was already saying that Respondent was going to "get rid of some of the f_____g union sympathizers." In other words, even before Respondent had ostensibly rated and ranked Bays 1 and 2 production employees, a member of the family who owned Respondent, who was also a member of its board of directors, already had known that "sympathizers" for the Union were going to be chosen for permanent layoff.

Those remarks by Kenneth Hinner are important for two reasons. Obviously, they evidence a predisposition on the part of Respondent to select production employees for permanent layoff on the basis of their union activism. Secondly, they tend to reveal that the entire assessment procedure, at least as applied to production employees laid off on September 22, had been nothing more than a facade utilized in an effort to conceal Respondent's true intention of "get[ting] rid of" production employees who had supported, and been active on behalf of, the Union in the recently-concluded campaign.

Such a conclusion becomes even more viable in view of the contrast between Roger E. Hinner Jr.'s above-described purported "20–30 percent" reduction direction and the instructions given shortly afterward to Wisniewski. Respondent acknowledges that as of September 3 there had been 108 production and maintenance employees working at the Schofield facility. No reduction in that number is shown to have occurred between that date and September 22. Deleting from that 108 number the above-mentioned 11 maintenance employees, that meant that as of September 22 there had been 97 production employees working at the Schofield facility. Yet, Fabrication Superintendent Wisniewski testified that he had been instructed by then-Human Resources Director Lance Rick that "we were to reduce [the employee complement] by 8 to 10 people," with "half of that . . . to be done through the maintenance department and the other part to be done on the floor in production."

Clearly, the instruction given by Lance Rick to Wisniewski was at odds with the directive which Roger E. Hinner Jr. testified that he had given to Lance Rick and, as well, to Gruling and to Rick Hinner. Putting the best face on that disparity, from Respondent's point of view, a change in number of production employees, to be selected for permanent layoff, may have occurred between the time that Roger E. Hinner Jr. issued his purported directive and the time when Lance Rick gave the above-described instruction to Wisniewski. Yet, Respondent presented no evidence whatsoever that would serve to support such a conclusion. As pointed out in subsection C above, neither Gruling nor Lance Rick appeared as a witness. Nor did Rick Hinner, There is no basis for concluding that any one of the three of them had not been available to appear as a witness for Respondent. In consequence, the record is left with the unexplained inconsistency between a purported directive by Respondent's president and the supposed instruction given to the fabrication superintendent charged with implementing that directive.

Beyond that, while as described above, Respondent's financial situation had become precarious by September, there is ample basis for questioning whether it had been so dire that permanent layoffs of any production employees would have been so natural a corrective course as Respondent now seeks to portray and, beyond that, whether selection of Bays 1 and 2 employees had been so logical as Respondent now argues. As pointed out above, it is uncontroverted that the General Motors' job had been completed by mid-September. Also undisputed is Roger E. Hinner Jr.'s testimony that "[t]he main delivery" for the Bronson job had been completed by August 15. Prior to September, those had been Respondent's main Schofield jobs during 1998.

In addition, at the beginning of the workweek of September 20 through 24 Schofield production employees had not been fully occupied. That is shown by several factors. According to a summary prepared from Respondent's timecards, 6,641.15 total shop hours had been worked during the workweek for

which paychecks issued on August 7 and 6,592.90 total shop hours had been worked during the following week. Of course, those had been workweeks immediately preceding "[t]he main delivery," as Roger E. Hinner Jr. put it, for the Bronson job.

In contrast, only 3,240.03 total shop hours were worked during the workweek for which paychecks were issued on September 18 and only 3,488.40 total shop hours were worked during the workweek for which paychecks were issued on September 25. No question that there had been a dramatic decline in total shop hours worked between those August and September workweeks, to a level in September of approximately half of the total hours worked during those August workweeks. It should not escape notice, nevertheless, that but four of 97 production employees had been selected for permanent layoff on September 22, despite those dramatic differences in total shop hours.

There was no significant increase in total shop hours worked during the remainder of 1998 and during early 1999. In fact, there was a further decline, undoubtedly reflecting the ongoing allowance by Respondent of reduction in staff through attrition. According to the summary, total shop hours during weeks after the one paid on September 25 varied from a low of 1,414.60 to a high of 4,277.55. Yet, no additional permanent layoffs of production employees were effected during any of those workweeks after September 21 through 25, in contrast to what occurred on September 22.

To be sure, beside what has been said in the preceding three paragraphs, records of welder/fabricators nominally assigned to Bays 1 and 2 reveal some diminished amount of work available for them immediately prior to that date. Some of those employees did work a full 40 hours during the pay period ending September 19: Cleveland, White, Kim Sloan, Raymond E. Harris, Daniel J. Klosinski, and Steve Trudell. Michael J. Arrowood and William C. Neitzel each worked 39 hours during that pay period. But, the YTD Detail P/R Register records for the pay period ending September 19, only some of which were offered into evidence, show that Tony W. Woodruff had worked 34.50 hours and that Radish, Tim Wiroll and Jonathan P. Arrowood each had worked only 32 hours during the pay period ending September 19.

Even more striking are the reduced work hours which Bays 1 and 2 employees had worked during the immediately preceding pay period, the one ending September 12 which, it should not be overlooked, had included a holiday. To the extent that YTD Detail P/R Register records were offered and received for that pay period, only Raymond E. Harris, Jonathan Arrowood, Dotseth and Tony W. Woodruff had worked a full 32 hours, with Dotseth and Woodruff each also having worked 2.50 overtime hours. In contrast, during that pay period ending September 12, White, Kim Sloan, Tim R. Wiroll. and Michael J. Arrowood each worked but 24 hours, with Cleveland and Steve C. Trudell having worked only 16 hours each.

Evidence of reduction in available work immediately prior to September 22 is not confined to records. Testimony by the General Counsel's employee-witnesses also discloses that hours being worked had declined by then. Thus, while White testified that he had been told by Gruling on September 21 that, "There is plenty of work"—a statement which may be explained by the description of Respondent's post-September 18 work set forth below—he conceded that he had been told that over the telephone on Monday, September 21 when he was at home as a result of there not being enough work to necessitate that he report for work on that Monday: "I don't think we worked—I don't think we worked Monday."

Dotseth agreed that it was fair to say that things had become pretty slow at Schofield prior to his permanent layoff on September 22. Sloan agreed that she had not been working overtime prior to the permanent layoffs on that date and, in addition, testified that Respondent "didn't have a lot" of big column and beam work, though "it wasn't completely out" of that work.

Radish testified that he had been sent home at 8 a.m. on Monday, September 21, after having "worked two hours" that day. He further testified that, at that time, he had been told "to call in about 3 o'clock in the afternoon to find out if we had work for the rest of the week or if we were supposed to come in to work." At the same time as he had been sent home that day, testified Radish, Kim Sloan also had been sent home and, moreover, Cleveland had been "sent home later in the day I believe."

Radish pointed out that employees had been sent home in the past when "no blueprints" had been received by Respondent. He further testified that blueprints were "supposed to be here by 2 o'clock" and, in the past, it had been after they had not been received by that time that employees were sent home: "We'd say sure, we'll go home at, you know, 3:30—2:30." Yet, on September 21 Radish and Sloan had been sent home at 8 a.m., not after 2 p.m. And there is no evidence that Respondent had been awaiting delivery of blueprints on that Monday. Accordingly, it cannot be said that failure to receive blueprints had played any role in the fact that at least some production employees had been sent home that day.

Even though Cleveland may not have been sent home until later on Monday, September 21, that did not mean that he had been occupied with production work while he had worked at the Schofield facility that day. For, he testified that he had been working for the paint department, repairing sawhorses on which beams and other parts are placed to paint them. "There wasn't very much there at all. They were low on work. There was some but not much," acknowledged Cleveland. Yet, slowing of production work during particular periods was not an unprecedented situation.

Cleveland testified that, during the time that he had worked for Respondent from July 5, 1995, to September 22, 1998, there had been times when work had been "slow" and, "There were times we swept floor for two weeks straight." No witness for Respondent disputed that testimony by Cleveland. Indeed, Wisniewski acknowledged that during the period prior to the September permanent layoffs, that had been precisely what many Schofield employees had been doing: "There was a lot of people out there that were sweeping floors to keep people there for their 40 hour week."

Yet, Respondent's witnesses conceded that during such times in the past, there had been neither permanent nor temporary layoffs for lack of work. Thus, Wisniewski testified that, during the years that he had been working for Respondent, "At no time in the little over 4 years have we ever had a layoff at

[Respondent]'s Schofield plant." Similarly, called as Respondent's witness, Bay 2 leadperson Delmar Gumz testified that during his 3–1/2 years at Respondent, there had been neither permanent nor temporary layoffs of employees due to lack of work. And the evidence shows that as of September 22 Respondent was not without prospective need for production employees to work following that date.

As pointed out above, White testified that Gruling had said during the afternoon of September 21 that, "There is plenty of work," and, in fact, all four alleged discriminatee-production employees testified that they had been fully occupied during the workday of September 22, at least until given notice of their layoffs. That might seem peculiar given Roger E. Hinner Jr.'s testimony that the General Motors job had been concluded about then and, moreover, that "[t]he main delivery" of the Bronson job had been completed during the week of August 15. However, that delivery did not truly complete Respondent's work on that job for Bronson.

During cross-examination, Hinner qualified his testimony about the Bronson job, acknowledging that it had been but "[t]he main delivery" which had been completed by the week of August 15, and that there still had been what he characterized as "a little bit of clean up work after that" to be performed. At another point, he defined that "clean up work" as being principally "change order work." In both instances Hinner appeared to be attempting to minimize the significance of that work, whether characterized as "clean up" or "change order." Yet, in the end, he conceded that there had been "[a] million dollars worth" of it which had been performed by Respondent and, further, that, "It's not complete yet today." As no point did Roger E. Hinner Jr., nor any other witness for Respondent, claim that "clean up" or "change order work" had not been anticipated at the time that "[t]he main delivery" for the Bronson job had been made. That is, at no point did Respondent's witnesses claim that such work was of a type that could not have been fairly anticipated, given the nature of the job being performed for Bronson.

Respondent never adduced evidence of the exact sources of that "million dollars worth" of "clean up" or "change order work." Some of it may have been generated from stair-fabrication which, consistent with practice, had been subcontracted for performance by an unrelated party. Another part of it was absorbed by what was referred to as brick relief work. Hinner testified that only "a small amount of it" was performed in the Schofield facility; the "major part" of it was done at the Merrill facility and "another part of it" was subcontracted to Norague Fabricating. Yet, Respondent never contended, much less provided evidence, that brick relief work for the Bronson job could not have been performed at the Schofield facility. Nor was there evidence of past instances of brick relief work being performed at the Merrill facility or by a subcontractor, such as Norague Fabricating.

Beyond any production work which could fairly have been anticipated having to be done for Bronson as of September 22, there was an additional job which Respondent acquired about that same time: a General Motors' job which it obtained under subcontract from Havens Steel. "I believe it was during the week of September 20th when it was sold," testified Roger E. Hinner Jr., though he added hastily, "I can't recall exactly when it was." Yet, his "week of September 20th" turns out to be probably an accurate statement, given that he earlier testified that "we would have had a small amount [of the Havens job] starting in October—possibly a little in September with setting up jigs," which, he acknowledged, is a part of the fabrication process. Obviously, Respondent would not have been "setting up jigs" during September had it not acquired the Havens subcontract by then.

It should not be inferred that acquisition of the Havens subcontract was somehow inconsistent with Respondent's overall financial difficulties during 1998. Havens had been performing that job for General Motors, but had encountered difficulty performing it under the projected schedule. The job was similar to the one which Respondent had completed for General Motors. Officials of the latter had suggested that Respondent take over part of the fabrication being performed by Havens. All of the detailing had been completed by Havens and it also had purchased the steel—angles, beams, channels, plates—needed for the job. As a result, aside from its payments for labor, Respondent needed only to draw on a minimum, if any, of its by-then diminished line of credit.

Even so, the work to be performed was not insignificant; the job was not some sort of small project. Roger E. Hinner Jr. acknowledged that it required fabrication of "approximately a thousand tons of trusses" and estimated that it took Respondent "[a]pproximately three months" to complete it, though some of that time was absorbed by "an error made in the fit up of the diagonal bracing within the trusses," which led to "somewheres around 600 man hours of rework to repair them." Nevertheless, even excluding that unanticipated "rework," as of September 22 it appears that Respondent could have fairly anticipated that some of Roger E. Hinner Jr.'s "hole coming up in production right after the General Motors job" had been completed would be filled by the later-acquired subcontract from Havens. So far as the evidence shows, however, Hinner never took that work acquired after August into account in determining that production employees should be permanently laid off. Certainly, Rick Hinner, Gruling, nor Lance Rick ever appeared and testified that it had been acquisition of the Havens job which had led to the instruction to Wisniewski to select only four production employees for layoff. To so conclude would be speculation and, further, would supply a defense for Respondent which it has never advanced.

It seem likely that it was the newly acquired work for Havens to which Gruling had been referring when, it is uncontroverted, he had told White "[t]here is plenty of work," during their above-mentioned afternoon telephone conversation on Monday, September 21. Such an inference is not precluded simply because White had been nominally assigned to Bay 1 as of September 21. After all, as mentioned in subsection B above, welder/fabricators had been moving between Schofield bays on almost a daily basis as of that time. Even if, as Wisniewski claimed, such movement into Bay 3 had been relatively infrequent, there is no basis in the record for concluding that it had never occurred, given Wisniewski's concession that, "All welders that are in the plant are capable of going from one

bay to another," as well as the other evidence about such movement referred to in that subsection.

Indeed, even without regard to what was occurring in Bay 3 on and after September 22, the evidence reveals that there was ample work left to be performed in Bay 2, to which Dotseth was nominally assigned, and in Bay 1, to which the other three alleged discriminatees were nominally assigned as of that date. YTD Detail P/R Registers reveal that during the pay period ending September 26, when the alleged unlawful permanent layoffs had occurred, overtime in Bay 1 had amounted to a total of 16.50 hours for Raymond E. Harris, Gordon L. Roesler, and Tim R. Wiroll, three of the five welder/fabrications who remained assigned to Bay 1 following the September 22 layoffs of Radish, Cleveland, and White. Considering that at least some Bay 1 employees had not worked on Monday, September 20, as described above, seemingly all of that overtime had been worked during the remainder of that week, after the September 22 layoffs. At least, no alternative explanation had been advanced for when during that workweek those overtime hours had been worked.

During the following pay period, ending October 3, Eli T. Bierman worked only 35.00 hours. However, the other four Bay 1 employees—Harris, Roesler, Wiroll, and William C. Neitzel—each worked 40 regular hours and three of them worked overtime hours, as well: Roesler 9 overtime hours, Harris 8.75 overtime hours, and Neitzel 3 overtime hours. Not only did all five of those Bay 1 employees work a full 40 regular hours during the pay period ending October 10, but Harris, Roesler, Wiroll, and Neitzel each worked 10 overtime hours during it, with Bierman working 9.80 overtime hours—a total of 49.80 overtime hours during the pay period ending October 10.

Wiroll worked 40 regular hours plus 5 overtime hours during the pay period ending October 17, but 36 regular hours during the pay period ending October 24 and only 27 regular hours during the pay period ending October 31. Work during the latter part of October also dropped off for Eli T. Bierman who work 40 regular hours and one overtime hour during the pay period ending October 24 and 27 regular hours during the one ending October 31. Yet, their reduced work hours during those 2 pay periods do not appear to have been the result of a decline in work for Bay 1 production employees after the pay period ending October 17.

Raymond E. Harris worked 40 regular hours and 10 overtime hours during the pay period ending October 17; worked 40 regular hours and 9.50 overtime hours during the pay period ending October 24; and, worked 40 regular hours and 10.65 overtime hours during the pay period ending October 31. William C. Neitzel worked 40 regular hours and 9.80 overtime hours during the pay period ending October 17; worked 40 regular hours and 9 overtime hours during the pay period ending October 24; and, worked 40 regular hours and 3 overtime hours during the pay period ending October 31. Gordon L. Roesler worked 40 regular hours and 10 overtime hours in each of the pay periods ending October 17 and October 24, though he worked only 27 regular hours and no overtime during the pay period ending October 31. Still, his YTD Detail P/R Register attributes 8 hours to holiday and another 8 hours to vacation time for that latter pay period. As a result, it is not altogether certain that, had he wanted to, Roesler would not have worked a full 40 hours that pay period and, perhaps, some overtime as well, as had been worked by Bay 1 welder/fabricators Harris and Neitzel.

Overtime was also a feature of Bay 2 production work after September 22, based upon the limited number of YTD Detail P/R Registers which were produced. For example, during the pay period ending September 26 Kim Sloan and Jonathan P. Arrowood each worked only 34 regular hours, seemingly reflecting the above-described lack of work on Monday, September 21. Nevertheless, during that same pay period Bay 2 welder/fabricators Michael J. Arrowood, Steve C. Trudell, and Peter A. Vandre each worked a full 40 regular hours. In addition, not only were a full 40 regular hours worked during that pay period by three other Bay 2 welder fabricators, but each of them also worked overtime hours: 9.50 hours by Daniel J. Klosinski, 9 hours by Jay A. Schmidt, and 1.50 hours by Tony W. Woodruff. Moreover, overtime continued to be a feature of Bay 2 work during succeeding pay periods.

Only 26 regular hours were worked by Jay A. Schmidt and only 32 regular hours were worked by Michael J. Arrowood during the pay period ending October 3. Yet, every other Bay 2 production employees worked a full 40 regular hours during that pay period and, as well, significant overtime hours were worked during it: 11 hours for Woodruff, 9 hours each for Jonathan P. Arrowood and Peter A. Vandre, 8 hours for Klosinski, 7 hours for Trudell, and .50 for Kim Sloan. Then, while Trudell worked only 35 regular hours during the pay period ending October 10, all other Bay 2 production employees worked a full 40 regular hours plus some overtime: 10 hours each by Sloan, Jonathan P. Arrowood, and Peter A. Vandre; and, 7 hours by Woodruff, 4 hours by Schmidt, and 2 hours each by Klosinski and Michael J. Arrowood—a total of 45 overtime hours during that 1-week pay period.

During the pay period ending October 17, Trudell worked 33.25 regular hours before his employment with Respondent ended and Schmidt worked 27 regular hours before his employment with Respondent also concluded. All other Bay 2 welder/fabricators worked a full 40 hours each during that pay period, with Woodruff, Sloan and Vandre each also working 10 overtime hours, while Klosinski and Michael J. Arrowood each worked one overtime hour. During the pay period ending October 24, Michael Arrowood worked only 36 regular hours, but all other Bay 2 employees each worked a full 40 regular hours and Woodruff and Peter Vandre each also worked 10 overtime hours, and Klosinski worked 9-, Sloan 6- and Jonathan Arrowood worked 5-overtime hours.

Not all Bay 2 production employees worked a full 40 regular hours during the pay period ending October 31. Woodruff worked 36.25 hours. Jonathan Arrowood worked 35.60 hours. Michael J. Arrowood worked 35.25 hours. However, other Bay 2 employees worked a full 40 regular hours during that pay period and, in addition, overtime hours. Thus, Peter A. Vandre worked a total of 50 hours, and Klosinski and Sloan each worked a total of 45 hours during the pay period ending October 31.

To be sure, the foregoing enumeration of post-September 22 regular and overtime hours, standing alone, does not refute an

asserted legitimate defense of necessity to reduce an employee-complement in a context of adverse business-situation. Yet, it does tend to show that production work for employees nominally assigned to Bays 1 and 2 had not simply evaporated during late September and during October. In fact, that enumeration seems to demonstrate that left for production employees in those two bays was more work than those employees were capable of performing during the regular workweek. Unexplained by Respondent was for what job(s) those employees were performing their regular and overtime work during those pay periods. Yet, if the Havens subcontracted work was being performed only by Bay 3 production employees, and if the Bronson "clean up" and/or "change order work" had been no more than minimal, then it is difficult to infer what work was requiring that so many Bays 1 and 2 welder/fabricators perform a full 40 hours of regular work and, as well, substantial amounts of overtime work.

In that connection one other fact cannot be overlooked. Despite its adverse financial situation and the September 22 permanent layoffs which it assertedly bred, nevertheless Respondent did not altogether cease hiring after September 22. It hired for "Fabrication," according to its internal newsletter, *Steel Post*, John T. Lloyd on October 21. And during the following month it hired Freeman J. Bushar, Jr., also for "Fabrication," according to the *Steel Post*. Of course, their hirings may have resulted from some unanticipated problem which Respondent had encountered as the Bronson and Havens jobs progressed or, perhaps, because of a need to replace welder/fabricators who had departed employment with Respondent after September 22, such as Trudell and Schmidt. But, no one can reach such a conclusion based upon the evidence presented. Respondent advanced with particularity no reason(s) for its decisions to hire fabricators Lloyd and Bushar. Thus, the record is left with a defense that Respondent had permanently laid off four welder/fabricators on September 22 to reduce its employee complement in the face of adverse financial circumstances, but within 2 months had hired two employees who apparently performed the same types of work as the four permanently laid off employees and, during those 2 months, significant amounts of regular and overtime work had been performed by employees in bays from which the four alleged discriminatee-production employees had been laid off.

Of course, hiring a couple fabricators, and even performance of not an insignificant amount of post-September 22 overtime by Bays 1 and 2 employees, would not necessarily suffice to obliterate the legitimacy of Respondent's defense. Yet, those facts do not stand alone. As set forth above, there is an unexplained inconsistency between Respondent's president's purported directive about the magnitude of personnel to be reduced and the ensuing instruction to the fabrication superintendent regarding the number of maintenance and production employees to be selected for permanent layoff. Moreover, the assessments and layoffs of maintenance employees were effected in a pay period earlier than assessments and layoffs of production employees, somewhat diminishing a defense that all eight layoffs were but components of an overall reduction in force directive. Further, by September 22 Respondent had acquired what seems to be a substantial amount of additional work—1,000 tons of heavy trusses—as a result of the Havens subcontract. Apparently it had been that work to which Plant Superintendent Gruling had been referring when, following somewhat of a drought in Schofield facility production work, he undisputedly asserted, "There is plenty of work." Certainly, that turned out to be the fact in Bays 1 and 2. And a number of other factors tend to further undermine the reliability of Respondent's defense, as discussed in the succeeding subsection.

E. Selections of Radish, Cleveland, White, and Dotseth for Permanent Layoff

At the outset, of all the areas in the Schofield facility, selection of production employees for permanent layoff on September 22 was confined to Bays 1 and 2. In the final analysis Respondent never did fully explain why it had so narrowly confined the pool of production employees from whom those layoff selections had been made. Wisniewski advanced a partial explanation. But it was an incomplete one.

As described in subsection B above, Wisniewski testified that cranes in Bay 3 "were big enough to" move the Havens's job heavy trusses to the back area for painting and, further, that welder/fabricators in Bay 3 were "a close knit group of guys and gals" who performed "a lot of the more difficult work." Thus, it seems facially logical that Respondent would have excluded all Bay 3 welder/fabricators from consideration for September permanent layoff. Yet, there were remaining areas of the Schofield facility, other than Bays 1 and 2, from which layoff selections could have been made. For example, as described in the above-mentioned subsection, employees were performing production work in Bay 4 and there likely were other bays to which welder/fabricators were nominally assigned at the Schofield facility. There is no evidence that any of those production employees were going to be especially needed for the Havens job. Yet, Respondent never explained why those employees had not also been considered in selecting production employees for permanent layoff.

Reliance on Respondent's defense becomes even less feasible when the permanent layoff procedure which it followed is examined. As mentioned in the preceding subsection, in mid-September "Employee Assessment" forms were passed out. Yet, all Schofield production employees, or certainly those in Bays 1 and 2, had been rated less than 3 months earlier, during July, when Respondent had conducted its annual evaluations of employees. It could be argued that there is a difference between job performance factors rated in July and those rated in September. In fact, different forms were used for rating in September from those which had been used during July. Yet, the difference appears to be no more than one of form, rather than substance.

The "Employee Evaluation" forms used in July rated each employee in three general categories. First is "*Job Knowledge and Skill*" and, within that general category were the subcategories of "Understands requirements and has the knowledge and skill to perform specific job(s)"; "Ability to perform jobs(s) assigned and follow instructions"; and, "Demonstrates quality workmanship in job(s) assigned." In each subcategory a space was provided after each of four ratings—"Excellent," "Good," "Meets Standards," and "Unsatisfactory—so that a check or "x"

could be placed in the rating regarded by the evaluator as appropriate for performance in that subcategory.

The second general category on the July evaluation forms is "*Personal Efficiency*" under which is the single category of "Efficient in planning and use of time," with the same four choices and accompanying spaces for check or "x" in rating performance. The final general category is "*Interpersonal Skills,*" again with but a single subcategory—"Is tactful and sensitive to the needs and feelings of others"—and the same menu of four choices for rating performance in that area. Under each of those several subcategories, in addition, are two lines following the work "Comments," so that an evaluating official could write anything special that he/she believed to be necessary.

Near the bottom of the July forms is a "*Summary of Evaluation*" section. It presents evaluators with a choice between the alternatives of "Positive" and "Negative," below which are choices of "Yes" or "No" for "Continued Employment" of the employee being evaluated. Below that is a "Salary Recommendation" section presenting choices of "Same," "Increase" and "Decrease," after which are spaces for a recommended rate increase and date for making such a recommendation "effective."

Wholly facially different forms—"Employee Assessment" forms—were utilized in mid-September. Respondent never bothered to explain why it had chosen to prepare forms for September which differ from the "Employee Evaluation" forms used less than 3 months earlier. For that matter, Respondent never bothered to explain why it had believed it necessary to conduct another all-employee assessment in September when it had already evaluated all employees during July. Given some of the comparatively different ratings given to alleged discriminatees, a strong suspicion arises that new forms were utilized in September, and another rating conducted during that month, because Respondent believed that the July evaluations of those four employees would not support a defense of legitimacy for selecting them for permanent layoff.

The September forms list nine job performance categories: "Quality of workmanship"; "Exhibits a high ratio of output to input (Productivity)"; "Skill level"; "Attitude"; "Complying with orders and direction"; "Versatility"; "Supervision required"; "Attendance & Tardiness"; and, "Works well with others." The possibility of concluding, from the facial difference between the two forms, that Respondent had been seeking different information in September, from that which was provided by the July evaluations, founders on the rock of an important void in the record: Respondent never presented any evidence that some forms of different information were being sought in September than had been obtained from the July evaluations. That is, at no point did any of Respondent's testifying officials ever claim with particularity, or even generality, that different or more refined information had been sought in September.

The only testimony about preparation of the September "Employee Assessment" forms was provided by Wisniewski. He testified that he "did play a part" in designing the process utilized to select employees for permanent layoff during September. He also testified that "Lance Rick, Tim Gruling and myself" had designed those forms. But, Wisniewski never explained what the September-designed forms were intended to accomplish for Respondent that had not been achieved by the "Employee Evaluation" forms utilized in July and, for that matter, during 1997. Obviously, such an explanation was not forthcoming from either Lance Rick or Gruling.

In fact, initially Wisniewski claimed that the assessment areas of performance "is actually a part of our evaluation form when its comes for reviews." And Wisniewski conceded initially that "[t]he same criteria" were involved on both forms and that the assessment forms were "pretty much the format that we use to evaluate our personnel out in the plant." Such testimony hardly supplied an explanation of why Respondent had gone to the trouble in September of designing and distributing entirely new forms.

At some point during cross-examination it appeared to dawn on Wisniewski that identical comparison of the two forms might not be helpful to Respondent's defense: that possibly it might be inferred that the assessment forms had been prepared for no reason other than to improve Respondent's defense to an unfair labor practice allegation, given that the July evaluations of the four alleged discriminatees were not so adverse as to naturally support a defense of legitimacy for their selection for layoff. Thereafter, Wisniewski testified that "we did add a couple of things." When pressed further about that testimony, however, he relented somewhat, testifying "the only thing that was added was that last criteria that works well with others as far as my recollection." Yet, Wisniewski never explained how "Works well with others" on the assessment form differed in any respect from "Is tactful and sensitive to the needs and feelings of others," which appears on the evaluation form. Nor did any other witness for Respondent advance such an explanation. In the final analysis, the only seeming difference between the forms is that the "Employee Assessment" form contained a category for "Attendance & Tardiness" that is not included on the "Employee Evaluation" though, as will be seen, absences and tardiness were recorded on evaluations when the evaluators felt that adverse comment about them was warranted.

Another difference between the two forms is the ratings which can be assigned for each category or subcategory. As set forth above, the evaluation form provides for ratings of "Excellent," "Good," "Meets Standards" and "Unsatisfactory." In contrast, the September assessment form provides for five ratings choices: "1. Distinguished—Consistently exceptional"; "2. Commendable—Exceeds acceptable job requirements"; "3. Competent—Meets acceptable job requirements"; "4. Needs Improvement—Needs immediate improvement"; and, "5. Unsatisfactory—Termination of employment." These five seemingly more refined ratings could tend to support a defense that Respondent had been trying in September to more precisely assess its employees' performance, given that it anticipated taking a step—permanent layoff of personnel for lack of work—that it had never before taken. After all, if nothing else, the "Needs improvement—Needs immediate improvement" rating of the assessment forms supplies an intermediate rating step between the evaluation form's "Meets Standards" and "Unsatisfactory" ratings. But, Respondent did not advance such an explanation. Nor, as pointed out above, did it advance

any explanation for the newly designed September form. Accordingly, no explanation can be supplied for Respondent.

Respondent made another change in connection with its September ratings, at least so far as Bays 1 and 2 production employees were involved. The September ratings for maintenance employees appear to have been made by the same officials as had evaluated those employees during the Summer. However, Bays 1 and 2 employees were not assessed in September by the same person as had evaluated them in July. Instead of being assessed by Gruling, who had evaluated them in July, Bay 1 employees were assessed during September by their leadman, Alan Vandre, and Bay 2 employees were assessed by Bay 2 leadman Delmar Gumz. No evidence shows that either Vandre or Gumz had been a statutory supervisor. Moreover, no evidence has been presented that concern for the opinions of either leadman had been displayed when past evaluations had been conducted. So far as the record discloses September had been the very first time when any leadman had been involved in rating any of the Schofield production employees. Yet, Respondent never explained why it had abruptly made that change.

As an objective matter, that rating-official change had some benefit were Respondent actually seeking to construct a facially legitimate reason to advance for, in reality, unlawfully-motivated layoff selections. As discussed in further detail below, with one exception the alleged discriminatees had received relatively favorable ratings from Gruling when he had prepared his July evaluations. There is no evidence that performance of any one of those alleged discriminatees had deteriorated in any significant regard between early July and September 22. Accordingly, if, as Kenneth Hinner stated to Truss, Respondent wanted to "get rid of some of the f_____g union sympathizers," then-Plant Superintendent Gruling would have been placed in an awkward position, were he to have rated unfavorably the same employees whom he had rated relatively favorably less than 3 months earlier. As an objective matter, inconsistencies between July and September ratings could be too stark for the same evaluator/assessor to simply explain away.

It can hardly be said that either Vandre or Gumz devoted very much effort to rating welder/fabricators in their bays. During the afternoon of Monday, September 21 each was given assessment forms to complete for the welder/fabricators in his bay. Each was told to rate those employees, by circling one of the above-described rating numbers in each of the nine above-listed categories on the "Employee Assessment" forms and, in addition, to rank production employees in his bay, from 1 to 8 by Vandre for Bay 1 employees and from 1 to 9 by Gumz for Bay 2 employees, in descending order so that the number 1 would be assigned to the Bay's highest-ranking employee.

"About 20 minutes," estimated Gumz at the time it had taken him to complete all nine assessments for Bay 2 welder/fabricators. To complete his eight assessment forms for Bay 1 employees, it took Vandre somewhat longer: "An hour—an hour and 15 minutes," he estimated. Despite the apparent fact that neither leadman had ever before rated, much less ranked, employees, when preparing their assessments both conceded that they had relied upon no personnel, attendance nor quality control records—hough, admittedly, Respondent maintains such records. Instead, as Vandre acknowledged, the ratings and rankings were prepared solely from memory and impressions. Neither leadman explained why he had not referred to any records whatsoever in preparing his assessments. Nor, given the importance which Respondent intended to attach to the assessments' results, did Wisniewski or any other official of Respondent explain why the leadmen had not been instructed to refer to records when preparing those assessments.

Perhaps to no one's great surprise, Dotseth received the lowest ranking from Gumz among the nine Bay 2 employees, and Vandre assigned the lowest rankings in Bay 1 to Radish and White, with Cleveland and Tim Wiroll tied for the position immediately above Radish and White. After the completed assessment forms were submitted by Vandre and Gumz, they were reviewed—obviously, during the morning of September 22—by Gruling and Wisniewski, according to the latter. There is no evidence that the two supervisors' review of the leadmen's assessments involved any re-rating of any Bay 1 or Bay 2 employees in any of the nine categories though, as discussed below, many of those ratings by Vandre and Gumz were at odds with the ratings which Gruling had given Bays 1 and 2 employees during the July annual evaluation. But, revision was made of some of the rankings. Still, Dotseth was left ranked last in Bay 2; Radish and White were left ranking last in Bay 1. However, for no reason disclosed by the record, Wiroll was elevated to rank number 3 in Bay 1, leaving Cleveland ranked by himself immediately above Radish and White. Thus, the four alleged discriminatees were relegated to the last-ranked positions in their bays.

For the most part, nothing of analytical significance was said when Dotseth, Radish, Cleveland, and White were given notice on September 22 of their permanent layoffs. Yet, one aspect accompanying those layoffs should not be overlooked. An "EMPLOYMENT TERMINATION REPORT" was prepared for each one. On each report was stated that the alleged discriminatee was not "recommend[ed] re-hire," and written as the reason for that was simply "performance." However, those termination reports are not signed by Human Resources Director Lance Rick, as might be expected given the significance of those permanent layoffs as the very first ones for lack of work in Respondent's history.

Instead, each of the four termination reports is signed by "Sandy Draeger," of whom the record shows only that she was employed at the time in human resources for Respondent. Draeger was never called as a witness, though there is neither evidence nor representation that she was not available to testify. As a result, the record is left with no explanation for the above-quoted entries on the termination reports which, after all, appear to portray the permanent layoffs as resulting from unsatisfactory work performance, rather than from layoffs resulting from reduction in force due to economic considerations. That is, no explanation can be gleaned from the record concerning the reason for those "performance" entries by, apparently, Draeger on the termination reports.

For three of the alleged discriminatees her "performance" entries do not correspond with Gruling's evaluations prepared less than 3 months earlier. To be sure, one of the alleged discriminatees—Dotseth—was assigned an overall "Negative" rating in

July and, moreover, Gruling placed no check in either the "Yes" or "No" alternatives presented after the "Continued Employment" section of Dotseth's July evaluation (GC Exh. 26). In addition, while Gruling placed checks in the blanks after "Meets Standards" for each of the above-described subcategories of the three general categories on Dotseth's July "Employee Evaluation," those checks are placed near the end of each blank, almost on top of the "U" of the following "Unsatisfactory" rating. In some situations, placement of those checks might be inferred to have represented marginal ratings for Dotseth in each subcategory. But were that the situation here, surely Gruling could have appeared and so-testified. He did not do so, though no legitimate reason has been advanced for his nonappearance, and I am reluctant to draw an inference from check mark-placement which could be designed, but which also could represent no more than check marks written in haste.

Two additional points should be noted with regard to Dotseth's July evaluation. First, despite what was checked or not checked on it, Gruling did recommend on the form that Dotseth be awarded a 50-cent per hour wage increase, effective July 1. Second, by the time that Gruling prepared Dotseth's July evaluation, Wisniewski had made plain, to Truss, that Respondent knew that Dotseth was "one of the union organizers" and "would be gone before the vote came," as described in subsection B above. True, Dotseth was not "gone" as of early July. But, there is no evidence even indicating that Wisniewski had become less hostile, between May and July, toward Dotseth because of the latter's union activities. So, there is some basis for questioning the legitimacy, even, of Gruling's July evaluation of Dotseth.

Even were it to be concluded that Dotseth's "performance" had truly dissatisfied Gruling, it is not possible to conclude that he had been similarly dissatisfied with the performances of Radish, Cleveland, and White. On their July "Employee Evaluation" forms he checked "Meets Standards" in all subcategories. He checked "Positive" as the "Summary of Evaluation" for all three. For "Continued Employment," Gruling checked "Yes" for all of them. In consequence, left unexplained is why the "performance" of any one of those three alleged discriminatees over the course of the succeeding 2–1/2 months had become so unsatisfactory as to warrant no consideration for rehire. To be sure, Respondent asserts that it wanted all four laid off alleged discriminatees to understand that rehire was not a possibility, given Respondent's financial situation. Yet, that hardly explains the "performance" entries. Beyond that, as described in subsection D above, Respondent did hire fabricators during October and November.

Additional inconsistency in Respondent's defense is revealed by closer comparison of Gruling's July evaluations of the four alleged discriminatees with Vandre's and Gumz's ratings of them. For example, Vandre assigned the lowest possible rating—"5. Unsatisfactory—Termination of employment"—to Radish for "Complying with orders and direction" and for "Attendance & Tardiness," and the next lowest rating—"4. Needs Improvement—Needs immediate improvement"—to Radish for "Exhibits a high ratio of output to input (Productivity)"; "Attitude"; "Versatility"; and, "Supervision required." When Vandre was questioned about his ratings, he denied generally that they had been influenced by union considerations. Yet, he gave no more detailed explanation for his ratings other than the general one that he had rated Bay 1 welder/fabricators "just the way I see that at that time when I made these out," based on, "Production and quality."

Now, Radish had been a relatively long-term employee of Respondent, having worked continuously for it since June 29, 1992. Those years were not without some blemish on his employment record. On his 1997 evaluation Gruling had written, in "Comments" sections, "We would like you to increase your productivity," and, "Need improvement on attendance [&] starting on time, like a commitment from you for more hours." Clearly, those written "Comments" demonstrate that Gruling was not hesitant to reduce his criticisms to writing when annually evaluating Respondent's production employees. Yet, no such remarks appear in any of the "Comments" sections of Gruling's July evaluation of Radish. So far as the evidence shows, therefore, Radish had satisfied by mid-1998 whatever performance concerns that Gruling had harbored during the first half of 1997.

In fact, Respondent's "absentee reports" for Radish disclose that, prior to September 22, he had been absent only twice during 1998: on January 5 due to "weather," and on May 11 due to illness. Still, it should not be overlooked that examination of Respondent's attendance records for Radish raises some question about their reliability.

Absentee reports are filled out each day that an employee is absent or tardy. Also maintained for each employee is an absentee calendar on which all days for all months are printed. Thus, attendance and tardiness entries can be recorded on the appropriate day of the appropriate month and, at a single glance, an employee's entire attendance and tardiness record for the year is revealed.

Radish's 1998 absentee calendar shows a "Discipline" absence on Friday, September 4. Radish denied that he had been absent on that date and, further, denied that he had suffered any disciplinary absence during 1998. His personally-maintained calendar showed that he had worked on September 4. Respondent introduced no absentee report reflecting that Radish had been kept from work on September 4 for disciplinary, or any other, reason. In sum, it is difficult to infer exactly how Radish's "Attendance & Tardiness" had been so poor that Vandre could have rated Radish's record as warranting "Termination of employment."

In addition to the inherent inexplicability of Vandre's "Attendance & Tardiness" rating for Radish, in view of the latter's actual 1998 attendance record, that rating comes into even greater question in light of ratings in that category given by Vandre to some other Bay 1 welder/fabricators. Vandre gave a "3. Competent—Meets acceptable job requirements" rating to Tim R. Wiroll, even though during 1998, prior to September 22, Wiroll had been absent, for various reasons, at least 10 times and tardy 7 times, according to his 1998 absentee calendar. Vandre gave a "2. Commendable—exceeds acceptable job requirements" rating for "Attendance & Tardiness" to William C. Neitzel who, like Radish, had two absences during 1998, prior to September 22. And Vandre gave that same "2. etc." Rating to Eli T. Bierman even though, during 1998 prior to

September 21, Bierman had been absent four times and tardy twice. Most inexplicable is the "1. Distinguished—Consistently exceptional" rating which Vandre assigned for "Attendance & Tardiness" of Raymond Harris. Harris had been absent from work, for various reasons, on nine dates during 1998, prior to September 22. Indeed, that same "1. etc. " rating was awarded by Vandre to Gordon L. Roesler, even though Roesler had been absent eight times and tardy once during 1998, prior to September 22.

Not to be lost sight of is the fact that while the *rankings* of bay employees had been a relative process—for example, as between two even identically-rated employees, one had to be picked for ranking above the other—*rating* of employees, by contrast, was an absolute process, at least so far as the record shows. Thus, it would seem that the same criteria would apply when rating employees' "Attendance & Tardiness"—a more frequently absent and/or tardy employee should naturally receive a lower rating than a less frequently absent and/or tardy employee. As shown by the recitations in the immediately preceding two paragraphs, however, that is not what Vandre had done. And Vandre never explained with any particularity why he had not rated Bay 1 "Attendance & Tardiness" more accurately. True, he claimed that he had not looked at any records, but rather had relied on his subjective impressions about employees in that Bay. Even so, surely an employee's nine absences during the preceding 8-1/2 months would naturally leave a more adverse impression of that employee's "Attendance & Tardiness" than would be the fact for an employee absent only twice during that period.

Also not to be overlooked is the fact that while Vandre had not looked at attendance records when preparing the assessments, surely Wisniewski and Gruling had the opportunity to do so, in the course of reviewing the completed assessments turned in by the leadmen. Yet, so far as the record shows, neither one did so. And that seems peculiar, at least, in the case of Gruling. After all, he obviously had been taking attendance into account when preparing his annual evaluations, even though there is no specific category or subcategory for attendance on the "Employee Evaluation" form. As pointed out above, Gruling has commented specifically about Radish's attendance on the latter 1997 evaluation. Seemingly, in the course of reviewing Radish's assessment ratings, Gruling would have noted the quite adverse "Attendance & Tardiness" rating assigned to Radish by Vandre.

Interestingly, Vandre rated Cleveland as "3. Competent, etc." for "Attendance & Tardiness," even though Cleveland had been absent at least seven times during 1998, prior to September 22. In contrast to Radish, Vandre did not rate Cleveland as "5. Unsatisfactory etc." in any of the nine categories. But, Vandre did rate Cleveland as "4. Needs Improvement etc." in two categories: "Attitude" and "Supervision required." Yet, in his July annual evaluation of Cleveland, Gruling made no mention of any problems with Cleveland's attitude, nor any problems which might require that Cleveland be more intensively supervised. To the contrary, in July Gruling rated Cleveland as "Meets Standards" in the seemingly comparable areas of being "tactful and sensitive to the needs and feelings of others" and of "Demonstrat[ing] quality workmanship in job(s) assigned."

Beyond that, Cleveland's September ratings by Vandre were relatively affirmative. He receive "3. Competent etc." ratings for "Quality of workmanship," for "Exhibits a high ratio of output to input (Productivity)," for "Versatility," and, as pointed out above, for "Attendance & Tardiness." He received "2. Commendable etc." ratings for "Skill Level,, "Complying with orders and directions" and "Works well with others." Yet, to a degree at least, there is a seeming inherent inconsistency between the ratings in this paragraph and, at least, the "Supervision required" rating mentioned in the immediately preceding paragraph. After all, if an employees performs commendably with regard to "Complying with orders and directions," and competently with regard to "Qualify of workmanship," for example, there seems little reason to rate such an employee as "Need[ing] immediate improvement" in the area of "Supervision required." Perhaps that seeming inconsistency can be explained. But, Vandre did not do so. Neither did either Wisniewski nor Gruling.

Vandre advanced only minimal explanation for his ratings of Cleveland. He did testify that Wiroll and Cleveland "did a good job in welding and they were all right." But, then, Vandre claimed that Cleveland had "[a] little bit" of a drop off in "production and quality" at the time of his September 21 rating. If so, then Vandre never explained why he had rated Cleveland as "Competent" for "Quality of workmanship" and "Exhibits a high ratio of output to input (Productivity)" on the assessment for him.

Vandre made no particular mention of possible incidents underlying his above-mentioned "Needs Improvement" rating for Cleveland's "Attitude." But, Wisniewski did so, though it cannot be said that Vandre had the incidents related by Wisniewski in mind when Vandre rated Cleveland's attitude. Cleveland had received a written warning for "get[ting] into a shoving match" with a supervisor. But that had happened on March 1, 1996, 3–1/2 years before Cleveland was selected for permanent layoff. So far as the evidence discloses, no mention was made of that warning in Cleveland's annual evaluation for 1996, nor in his annual evaluations for the succeeding years.

Respondent elicited evidence of later confrontations involving Cleveland, only one of which was even partially disputed by Cleveland. Although Wisniewski was vague on the point, arguably all of them seem to have occurred after Cleveland received, on July 13, his most-recent evaluation, dated July 1. One incident involved Cleveland's assertion about hearing that he had been called "a useless pile of s__t" by Wisniewski. That led Cleveland to accuse Wisniewski of being a liar and, in turn, Wisniewski to begin swearing at Cleveland. Wisniewski denied specifically having called Cleveland "a useless pile of s__t."

Instead, apparently referring to the incident described by Cleveland, as set forth in the immediately preceding paragraph, Wisniewski testified about an incident when he had asked Vandre why Cleveland was in Bay 3 and, after Vandre had spoke to Cleveland, the latter came over swearing at Wisniewski. Yet, Wisniewski testified that, after everyone had cooled down, Cleveland "apologized three times" for having sworn at Wisniewski and, accordingly, the latter "let it go," rather than write up Cleveland. Neither Wisniewski nor Vandre testified

that the latter had overheard Cleveland swearing at Wisniewski, nor Cleveland call Wisniewski a liar, depending upon whose version is the more accurate.

In addition, testified Wisniewski, during "summer time," Cleveland had opened a plant door, supposed to be kept closed, to clear out smoke in the facility. Wisniewski testified that he had pointed out the open door to Gruling, but of course there is no corroboration for such a report to the latter. More significantly, Wisniewski testified that he had asked Vandre who had opened the door and the latter had replied, "Cliff did." Yet, although Vandre appeared as a witness for Respondent, he did not corroborate Wisniewski's description of that exchange between them about the open door.

Finally, Wisniewski testified that, while taking a weld test, Cleveland had disregarded express orders to clean slag off welds, instead of trying to weld over the slag. According to Wisniewski, Quality Assurance Manager Ron Shampo had been administering those weld tests when Cleveland had tried to weld over slag, instead of first cleaning it off: "Ron Shampo had caught him doing it and confronted him with it." There is no evidence, nor was there a representation, that Shampo was not available to Respondent as a witness, to corroborate Wisniewski's account of the asserted weld test incident. Yet, Shampo never appeared to corroborate that account. Again, there is no evidence that, had such an incident occurred, Vandre had been aware of it by the time that he prepared the September assessment for Cleveland, nor that he had relied upon it in assessing Cleveland's attitude.

As an objective matter, Respondent's defense encountered heavy seas in connection with Vandre's ratings for White. "5. Unsatisfactory etc." ratings were given for "Versatility" and for "Attendance & Tardiness." As with Radish, however, the latter category poses a problem for that rating. According to his 1998 absentee calendar, White had been absent twice and tardy twice, prior to September 22, during that year. Obviously, that is a better record than the above-described 1998 attendance records of more-highly rated Wiroll, Bierman, and Roesler, and a record comparable to the more-highly rated Neitzel. Vandre never explained the disparity. Wisniewski never explained why, when reviewing the completed assessments, he or Grueling had not discovered that ratings-disparity.

Once again, with regard to White there was a contradiction between his 1998 absentee calendar and absentee reports for him. The calendar shows White as having been absent on April 15 and on May 15. There is an absentee report for April 15. But, none was produced for White on May 15. Instead, an absentee report dated August 28 was produced. However, no August 28 absence entry appears on White's 1998 Absentee calendar. That disparity went unexplained.

One might argue that the foregoing paragraph's disparity is more nitpicking, than legitimate, consideration. Except, of course, that those absentee calendars and absentee reports are integrally related to Respondent's overall defense. Even had Vandre and Gumz not reviewed them before rating the "Absence & Tardiness" records of welder/fabricators whom were rated by those two leadmen, those records are the only objective measures of claimed subjective impressions of those two leadmen upon which they assert that they based their ratings. Surely, if the reality does not correspond to subjective impression, then there is some basis for questioning the reliability of assertions about those subjective impressions. Moreover, those attendance records were available to Wisniewski and Gruling. Despite the fact that they were the purported finalizing officials for ranking Bays 1 and 2 production employees, neither one apparently took the time to compare the leadmen's ratings with the records which Respondent concededly maintains. Those considerations simply cannot be disregarded under any characterization.

If White's "Attendance & Tardiness" during 1998 truly had warranted "Termination of employment," as Vandre's rating effectively states, then left unexplained is why Gruling had not said so in July. The two absences recorded on White's 1998 absentee calendar had occurred before that July annual evaluation. Gruling had shown, in connection with Radish's earlier evaluation, that he (Gruling) was not reluctant to note adverse attendance on evaluation forms. No reason is suggested by the evidence for why Gruling would not have made a like comment on White's July evaluation, had Gruling truly believed that White's attendance was so bad that termination was warranted. Yet, there is no attendance criticism on White's "Employee Evaluation" for 1998. Furthermore, Vandre admitted that he had never recommended that White be terminated.

In July Gruling evaluated White as "Meet[ing] Standards" in the subcategories of "Ability to perform job(s) assigned and follow instructions," "Demonstrates quality workmanship in job(s) assigned," and "Is tactful and sensitive to the needs and feelings of others." Respondent presented no evidence of any decline in White's performance thereafter. Yet, Vandre rated White "4. Needs Improvement etc." for "Attitude," for "Complying with orders and direction," and for "Supervision required," as well for "Exhibits a high ratio of output to input (Productivity)." In the course of reviewing those ratings, there is no evidence that Gruling made even an effort to ascertain the reasons for those seeming disparities between Vandre's September ratings in those areas and his (Gruling's) own ratings in similar areas less than 3 months earlier, even though in July Gruling had given a "Positive" overall rating to White and had recommended him for continued employment with Respondent.

As pointed out above, Dotseth apparently had not been regarded by Gruling in July as a model employee. Gumz's assessment of Dotseth is seemingly consistent with that evaluation. Thus, the highest ratings received by Dotseth were "3. Competent etc." for only two categories: Versatility" and "Attendance & Tardiness." In contrast, Gumz rated Dotseth as "5. Unsatisfactory etc." in two categories—"Quality of workmanship" and "Attitude"—and as "4. Needs Improvement etc." in the other five categories. Yet, as poor as Gruling might have viewed Dotseth's performance by, at least, July, there is no evidence that Gruling ever had recommended that Dotseth be terminated for poor performance. To the contrary, he recommended a wage increase in July for Dotseth, as set forth above. In fact, since having started working for Respondent on December 1, 1997, Dotseth had received a total of $1.50 an hour in pay increases. Moreover, Gumz's obvious effort to buttress Respondent's defense for Dotseth's layoff gives rise to problems for relying upon Gumz' testimony.

At one point Gumz asserted that Dotseth "was the less productive out of all the ones that I have. I felt he was the lowest—how can I word it? I just felt he was the less [sic] productive, I guess that's—out of all the people." Yet, for "Exhibits a high ratio of output to input (Productivity)," Gumz gave the same rating to Kim Sloan as he gave to Dotseth: "4. Needs Improvement, etc." If Dotseth truly had been the least productive Bay 2 production employee, Gumz never explained why he had not given a lower rating in that category to Dotseth than he gave to Sloan. Moreover, it should not escape notice that, in contrast to his above-described 1997 evaluation comment about Radish's need "to increase your productivity," Gruling had made no like comment on Dotseth's July evaluation. Small discrepancy, perhaps. Except that it does not stand alone.

Asked about his "5. Unsatisfactory—Termination of employment" rating for Dotseth's "Attitude," Gumz testified that it had was based upon Dotseth having been purportedly "late—tardy." It then was pointed out to Gumz that he had given a "3. Competent etc." rating to Dotseth for "Attendance & Tardiness," a rating hardly consistent with that "Attitude" explanation. A by-then seemingly flustered Gumz tried to recover by testifying, "Oh, okay. I guess that's where I was—I was [sic] kind of figured that was an attitude problem if you are possibly not being on the job or something. That's the way I looked at it." Yet, that was not truly a satisfactory explanation.

At best, Respondent's records disclose that Dotseth had been tardy for work twice during 1998, prior to September 22. In contrast, Gumz had rated Bay 2 employee Jay A. Schmidt as "2. Commendable etc." for "Attendance & Tardiness" and "3. Competent etc." for "Attitude," even though Schmidt had been tardy during 1998 on June 10, 17 and 25, and on July 1, 8, 21 and 29, according to his 1998 Absentee calendar. Gumz never explained those discrepancies between his ratings for Dotseth and Schmidt.

He did make an effort to explain having accorded Michael J. Arrowood a "2. Commendable etc." rating for "Attitude" when the latter had been tardy on May 8 and 20, on June 8, and on September 16—twice as often as Dotseth—and for having given a "3. Competent etc." rating to Jonathan P. Arrowood who, like Dotseth, had twice been tardy during 1998, prior to September 22: on July 8 and on July 13. "They apparently had doctor's excuses and stuff that I was aware of. That's—it was brought to my attention. They had excuses at the time," claimed Gumz. Yet, although included among personnel records for Jonathan Arrowood are medical center excuses for *absences* on July 2 and 31, no similar excuses are included for his July 8 and 13 tardinesses. And no medical excuses whatsoever are among the personnel records introduced for Michael Arrowood, even though he had nine absences during 1998, before September 22, in addition to his four tardinesses. Nonetheless, for "Attendance & Tardiness" Gumz awarded Michael J. Arrowood a rating of "2. Commendable—Exceeds acceptable job requirements."

Gumz got into further difficulty when he tried to explain other aspects of his ratings for Dotseth. Asked to explain his reason for rating Dotseth "5. Unsatisfactory etc." for "Quality of workmanship," Gumz first answered that Dotseth "just seemed to spend a lot of time taking too long to do stuff"—an explanation seemingly more pertinent to productivity than to quality of work. In fact, that was pointed out to Gumz. He responded, "Well, quality, if it isn't up there and he has got to do something over on it's just not working out," but then testified, "well, if he put on clips—I felt when he done [sic] something—how would I say that—it only should take maybe 15 minutes. It took him half an hour or longer to do something," and, "It just seemed to be on a slower scale." Of course, those answers still pertain to productivity, not work quality. And, interestingly, for "Exhibits a high ratio of output to input (Productivity)," Gumz gave Dotseth a "4. Needs Improvement etc." rating, not a "5. Unsatisfactory etc." rating, as might be expected had Gumz been testifying truthfully about his "Quality of workmanship" rating for Dotseth. Gumz's last word about the latter was, 'Well, that and the quality I guess too. If—how would I say it? I just—that's just the way I rated him I guess."

It should not be overlooked that, as mentioned above, Respondent possesses "records of" job errors and quality control documents, as Wisniewski conceded: "We do keep records of rework. We have to keep it for our standards that we keep out there." Yet, not only did Gumz not look at such records when rating Dotseth, but no such records of "rework" by Dotseth were produced during the hearing.

Finally, after having rated employees in his bay, Vandre and Gumz ranked them, as mentioned above. Based upon the ratings assigned to each, the leadmen's rankings are not illogical. But, as pointed out above, Vandre turned in a ranking that placed Wiroll and Cleveland at the same rank, number 4. In fact, both had been rated "4. etc." in two categories, "2. etc." in three categories, and in four categories both had received ratings of "3**.** etc." Of course, the particular categories in which those ratings were received varied between Wiroll and Cleveland. Still, neither Wisniewski nor, of course, Gruling testified that particular categories had been accorded greater weight than others, in their process of partially re-ranking some of the Bay 1 and Bay 2 production employees. Nor did either superintendent explain why they had decided to elevate Wiroll to the number 3 rank in Bay 1, even though that left him ranked higher than other Bay 1 employees who had received better overall ratings than had Wiroll, such as Bierman and Neitzel. What was accomplished by elevating Wiroll's rank to number 3 in Bay 1 is that it left some space between his ranking and that of the similarly-rated Cleveland who ended up ranked number 6 in Bay 1. That, then, left Cleveland, Radish and White as the lowest-ranking Bay 1 welder/fabricators and, of course, left Dotseth as the lowest-ranking Bay 2 welder/fabricator.

II. DISCUSSION

Following the methodology set forth in section I.A, above, the General Counsel has presented evidence showing that animosity toward their activities on behalf of the Union had motivated selection of Radish, Cleveland, White, and Dotseth for permanent layoff on September 22. As described in section I.C, above, the evidence shows that all four of those employees had been active on behalf of the Union and, moreover, that Respondent had knowledge of their support for the Union. Thus, Wisniewski admitted that he had known that Radish, White, and Cleveland were supporting the Union. Neither Wisniewski

nor any other witness for Respondent denied having known also about Dotseth's support for the Union. To the contrary, Wisniewski had told Lang during May that Dotseth "was one of the union organizers."

It is accurate that there is not extensive direct evidence of animus. Still, as pointed out in section I.A, above, direct evidence of it is not essential to conclude that a respondent harbored hostility toward a union and its employee-supporters. Animus can be inferred. "Even without direct evidence, the Board may infer animus from all the circumstances." (Citation omitted.) *Electronic Data Systems Corp.*, 305 NLRB 219, (1991).

One fact which does provide direct evidence of animus is unlawful statements by an employer's supervisors and agents—statements which violated Section 8(a)(1) of the Act because they naturally tend to interfere with, restrain, or coerce employees in the exercise of rights protected by Section 7 of the Act. See, e.g., *Greyston Bakery, Inc.*, 327 NLRB 433 fn.1 (1999); *Lemon Drop Inn*, 269 NLRB 1007, 1007 (1984), and cases cited therein. As concluded in section I.C, supra, Respondent did violate the Act when Wisniewski unlawfully threatened that Dotseth "would be gone" because he "was one of the union organizers and . . . figured he was going to be the union president if the [U]nion went through."

True, that threat had been made on May 4 and Dotseth was not permanently laid off until September 22, almost 5 months later. Nonetheless, Wisniewski's comment is not so remote in time from Dotseth's layoff that, as a matter of law, the threat cannot be taken into account in evaluating motivation on September 22. See, e.g., *Webb's Industrial Plant Service*, 260 NLRB 933, 938 (1982). Cf. *Meritor Automotive, Inc.*, 328 NLRB 813 fn. 4 (1999). Moreover, although it seems that Gruling had been the official who actually had distributed assessment forms to Bays 1 and 2 leadmen for completion, Wisniewski had been involved, along with Gruling, in reviewing the completed assessment forms and, so far as the record shows, in making the final selection of welder/fabricators to be laid off on September 22. There is no evidence that by that date Wisniewski had felt any less hostile toward Dotseth, because of the latter's support for the Union—and, for that matter, toward the Union's supporters, in general—than he (Wisniewski) had felt on May 4. Thus, the fact that Wisniewski had not carried out his threat before the representation election does not, of itself, somehow erase the possibility that he had implemented it after that election.

Aside from Wisniewski's May 4 threat, many of the objective factors which tend to show unlawful motivation are also ones which support an inference of animus: the only production employees permanently laid off on September 22 were ones who had been activists for the Union, those layoffs were effected less than 3 weeks after the September 3 representation election and less than 2 weeks after certification of that election's results, the layoffs occurred abruptly near the beginning of a pay period, all four alleged discriminatees were listed as not eligible for rehire because of "performance" even though their layoffs assertedly were for no reason other than reduction in force, work from Havens had been newly acquired and employees left in the alleged discriminatees' bays were obliged to work not insignificant amounts of overtime after September 22, over the following 2 months Respondent hired two fabricators, and, as described in section I, subsections D and E, supra, Respondent presented a defense characterized at various points by internal contradictions, by inconsistencies between accounts by its witnesses and between their accounts and objective considerations, by lack of corroboration for significant aspects of that defense, and by failure to provide testimony and documentary evidence, seemingly within its ability to do so, pertaining to important aspects of a reliable defense in the circumstances.

Not to be overlooked, in addition, is Kenneth Hinner's September prediction to Truss: that Respondent would be "get[ting] rid of some of the f_____g union sympathizers." Unfortunately Kenneth Hinner is in no position to exercise supervisory authority nor to make personnel decisions for Respondent. Yet, as a member of the family which owns Respondent and as a member in September of its board of directors, Hinner was in a position to be privy to decisions which his brothers and father were making. So far as the record discloses, at no time prior to September had Kenneth Hinner made the type of remark which he made during that month to Truss. And there is no basis for inferring that Kenneth Hinner had simply made up the prediction which he articulated to Truss. After all, shortly after he predicted that "some . . . union sympathizers" were going to gone, four of them were permanently laid off.

The totality of the foregoing factors provide ample support for a conclusion that Respondent had harbored animus toward employees who had been supporting the Union. They provide, as well, evidence sufficient to infer that Respondent's motivation for permanently laying off Radish, Cleveland, White, and Dotseth had been an unlawful one.

True, those layoffs occurred after the Union had already lost the representation election and, under Section 9(c)(3) of the Act, another election could not be directed in that same unit for a year. Accordingly, it might seem that Respondent would have no immediate concern about confronting another election and, in turn, no motive to layoff union activists. Nevertheless, of themselves, those considerations do not leave Respondent impregnable against a conclusion of unlawful motivation.

Retaliation for past union activity, even when continuation of it seems not to be imminent, is a long-recognized motivation which, of course, is unlawful under the Act. See, e.g., *NLRB v. Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982); *Atlas Railroad Construction Co.*, 262 NLRB 1206 (1982). In fact, "timing of [an] incident, which came immediately after the election" was held by the Board to support a conclusion of discrimination in *Huttig Sash & Door Co.*, 263 NLRB 1256, 1257 (1982).

While occurring less commonly than retaliation situations, there also have been situations where the unlawful motivation conclusion was based upon a respondent's intention to foreclose the possibility of future organizing activity, even though the representation election process had already been completed. See, e.g., *MDI Commercial Services*, 325 NLRB 53, 75 (1997), enfd. in pertinent part 175 F.3d 621 (8th Cir. 1999), and cases cited therein. In fact, in that case the Circuit Court endorsed specifically a conclusion of unlawful motivation based upon an effort "to discourage future organizing activity." (175 F.3d at 625.) Obviously, permanently laying off "some . . . union

sympathizers" would accomplish such an objective, by "get[ting] rid of" employees who had demonstrated a desire to become represented by a union.

Those September 22 permanent layoffs served the added purpose of discouraging employees who remained from engaging in such activities in the future. Permanent layoff of even some of the Union's activists would naturally "send a message to the [remaining] employees," *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1423 (11th Cir. 1998), about what they might suffer should they participate in the same types of statutorily-protected activities as had Radish, Cleveland, White, and Dotseth. Inherently, such a message would enable Respondent to "so extinguish seeds" during 1998 that it "would have no need to uproot [the] sprouts" of renewed union activities in succeeding years." *Ethan Allan, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975). After all, not everyone confines his thinking to the immediate future; many people do plan for what may happen a year or more in the future.

In that regard, Respondent had been put on notice that successive representation petitions could be filed. As set forth at the beginning of section I.C, above, the petition in Case 18–RC–16299 had been filed on May 29 but withdrawn on June 9, only to be followed by the July 29 filing of the petition in Case 18–RC–16338. Accordingly, Respondent's awareness of the fact that successive representation petitions can be filed is not simply some sort of abstract inference about state of mind. The filing of two successive petitions provided Respondent with a graphic showing that such petitions could be filed in the future, albeit not in the immediate one.

In sum, I conclude that the General Counsel has satisfied the burden of showing that antiunion animus had motivated the permanent production layoffs on September 22. As pointed out in section I.A, above, the burden then shifted Respondent to credibly show legitimate reason(s) for those layoffs—to show that it would have laid off Radish, Cleveland, White, and Dotseth even had there been no union activities by any of them. This Respondent failed to do.

No doubt Respondent has provided evidence of a "good" reason for reducing its force of Schofield production employees. It had suffered significant losses by September. Its line of credit had been halved, impairing its ability to attract the very type of business it had relocated custom steel fabrication operations to Schofield to be able to attract. Interest had been raised on what remained of that line of credit. Faced with such a situation, cost-savings would be a logical course for an employer to pursue and, within that overall course, reduction in force would be a logical component to save costs. However, as pointed out in section I.A, above, "mere presence of legitimate business reasons," *J.P. Stevens & Co.. v. NLRB*, *supra*, does not suffice to satisfy the burden imposed under the *Wright Line* methodology; it is "'real' reasons," not simply "'good' reason," which must be shown. *Hugh H. Wilson Corp. v. NLRB,* supra. Accordingly, it must be to the explanation of Respondent's witnesses and other evidence, for having chosen to effect the first layoffs of employees in its history for lack of work, that analysis must be directed.

As shown by the descriptions in subsections D. and E. of section I., above, when more than superficial attention is paid to the accounts of those witnesses, Respondent's defense virtually implodes. President Roger E. Hinner Jr. claimed that he had directed that maintenance staff be cut in half and that "all of the [other] employment [be reduced] by 20–30 percent." But, in the end, only four of approximately 97 production employees suffered permanent layoff thereafter. Indeed, when given instructions, supposedly implementing that directive by Respondent's president, Wisniewski admitted that he had been told to select only four or five production employees for permanent layoff. Those inconsistencies—between directive, on the one hand, and instruction to Wisniewski and actual number of production employees permanently laid off, on the other—are left unexplained.

To be sure, substantial reduction in the number of production employees eventually resulted through attrition. Yet, if Respondent had been willing to wait for attrition to accomplish reduction in force of its production employees, then unexplained is its September haste to permanently layoff only a relatively few of them—only four of approximately 97 production employees and, at that, all four of whom had been active on behalf of the Union.

Beyond that, the production employees' layoffs were portrayed by Respondent as having been one aspect of an overall layoff of all employees of the Schofield facility. Yet, implementation of those layoffs shows something other than a single, overall layoff. Layoffs of maintenance employees were effected near the end of one pay period; layoffs of the four production employees were not effected until near the beginning of the next pay period. Of course there could have been legitimate reasons for separating maintenance layoffs from the production ones. But, none was advanced by Respondent and, as pointed out already, it would be improper to supply an explanation not advanced by Respondent's witnesses.

In that connection, one additional point should not be overlooked. Even had there been a legitimate reason for separating maintenance from production layoffs, such as administrative convenience, that would not explain the separation of assessments-preparation for the two groups of employees. In other words, even were it to be speculated that Respondent had a legitimate reason for separating the actual layoff of maintenance employees from that of production employees, such a reason would seemingly not explain why assessments of maintenance employees had been made during the pay period ending September 19, while "Employee Assessment" forms for Bays 1 and 2 production employees were not even distributed for completion until the afternoon of the first day of the following pay period. Even had there been no intention to effect permanent layoffs of production employees until the pay period after those for maintenance employees, surely that would not have prevented simultaneous distribution of "Employee Assessment" forms to all assessors.

As suggested in section I.D, above, it may be that Respondent deferred planned September 18 layoffs of production employees after hearing about Kenneth Hinner's statements to Truss—statements which, of course, were reported to Gruling and, in turn, to Human Resources Director Lance Rick. In such a situation, an employer might postpone scheduled Friday layoffs in an effort to avoid the appearance of committing an un-

fair labor practice, at least to the extent of changing the predicted layoff day. Again, however, that is one explanation which none of Respondent's witnesses advanced. To so conclude would be nothing more than sheer speculation and, concomitantly, improper analysis.

Even had such an explanation been advanced, it would not extricate Respondent from the seeming inconsistency arising from assessment of the maintenance layoffs earlier than production employees. Moreover, Bays 1 and 2 employees were not assessed until Monday, September 21. Yet, Kenneth Hinner had known by "about the second week of September" how their assessments were going to turn out. He predicted to Truss that Respondent would be "get[ting] rid of some . . . union sympathizers." That turned out to be the fact: the lowest Bays 1 and 2 rankings were assigned to Radish, Cleveland, White, and Dotseth; those "union sympathizers" then were permanently laid off, purportedly based upon those low rankings.

While Roger E. Hinner Jr. claimed that he had directed a 20 to 30 percent reduction in "all of the employment," other than maintenance, the fact was that Gruling and Wisniewski did not look to all Schofield production employees when selecting which ones would be permanently laid off. They looked only to Bays 1 and 2—where, of course, the four union activists were nominally assigned. Gruling, of course, advanced no explanation for this pool of employees narrower than the one which Respondent's president had assertedly directed be considered. Wisniewski offered the explanation that Bay 3 employees were needed to perform the heavy truss work required by the Havens subcontract. Whatever else may be thought of the objective validity of that explanation, it hardly serves to explain why employees nominally assigned to other bays and areas of the Schofield facility were not considered, based upon their completed assessments, when choosing the production employees to be permanently laid off. So far as the record shows, layoff-choice was confined only to production employees nominally assigned to Bays 1 and 2, and to no other employees not then nominally assigned to Bay 3.

Exclusion of Bay 3 production employees, for consideration in selecting production employees for layoff on September 22, is significant in another respect. If they truly had been excluded from consideration because they were needed for the Havens work, then Respondent obviously knew by September 22 that it had been chosen to perform that heavy truss work. Thus, although the General Motors job had been completed by mid-September, Respondent knew by September 22 that another job would be replacing it—that the "hole coming up in our production right after the General Motors job," as Roger E. Hinner Jr. put it, was definitely going to be narrowed, if not altogether filled, by, as Hinner admitted, "a similar job" which Havens initially had been scheduled to perform for General Motors, but which was being subcontracted to Respondent.

In addition, Respondent concedes that there had been ongoing work that continued to be performed at the Schofield facility on the Bronson job. In fact, whatever weight might otherwise be accorded to Respondent's summary of total shop hours for post-September 22 work, described in section I.D, above, the YTD Detail P/R Registers are more concrete records of hours worked by Bays 1 and 2 production employees after that date. And those registers reveal that during those post-September 22 workweeks Bays 1 and 2 employees worked not insignificant amounts of overtime, as also described in section I.D, above.

In sum, even if one or more of the foregoing factors be minimized or, even, explained away for Respondent, the totality of remaining ones illustrates the unreliability of Respondent's defense that production employees' layoffs had been based on nothing more than legitimate business considerations in light of an adverse business situation. Having weathered a seemingly earlier September drought in work for Schofield production employees—one which Respondent absorbed, as in the past, by having assigned busy-work to those employees and by sending some home for the day—Respondent knew by September 22 that production work was going to be available, a fact which was effectively announced by Gruling when saying, during the afternoon of September 21, that there was "plenty of work."

In view of all of the circumstances, I conclude that Respondent has failed to credibly show that its business situation as of September 22 had actually motivated it to decide to layoff production employees on that date. Rather, while Respondent had been experiencing an adverse business situation by September 22, its witnesses have not credibly shown that that adverse business situation had led it to decide to change past practice by permanently laying off production employees—that such a decision would have been made, even absent the union activities which had taken place. Instead, I conclude that Respondent utilized its business situation as a springboard for advancing a defense of production-employee-layoffs which would not truly have occurred had it not wanted to "get rid of some . . . union sympathizers."

That conclusion should terminate the need for further discussion of the September rating, ranking and layoff selection process, since obviously that process would not have been even carried out for production employees had there not be a unlawfully-motivated decision to "get rid of some . . . union sympathizers." Still, some points about that process should not pass without some discussion, in light of what has been said in section I.E, above, since they reinforce a conclusion that Respondent's motivation had been unlawfully pretextuous.

All Schofield production employees, certainly those nominally assigned to Bays 1 and 2, had been evaluated in early July. In view of those relatively recent ratings, Respondent never explained why, less than 3 months later, it had decided to once more rate those same employees. Seemingly, rankings could have been made on the basis of the July evaluations, as augmented by the subjective impressions of leadmen and superintendents.

True, as pointed out in section I.E, above, the "Employee Assessment" forms do contain the "4. Needs Improvement etc." rating, between the rating categories of "3. Competent etc." and "5. Unsatisfactory etc." which was not available on the "Employee Evaluation" forms between the ratings of "Meets Standards" and "Unsatisfactory." Yet, Respondent never advanced more finely tuned ratings as having been the, nor even a, reason for designing and utilizing completely new forms for the September assessments. Once again, therefore, to reach such a

conclusion, or even to infer it, would be to supply an explanation which Respondent has not provided. And absent such an actually advanced explanation, the record is left with no reason whatsoever for Respondent's preparation and use of the "Employee Assessment" forms.

One reason for preparation and use of those forms is suggested by the evidence. The four discriminatees' July evaluations had not been so adverse—viewed on an absolute basis nor when compared with other Bay 1 and 2 employees' July evaluations—that they could be said to have naturally dictated their selections for permanent layoff on September 22, as opposed to selecting other production employees instead. Thus, creation and use of the "Employee Assessment" forms allowed Respondent to, in effect, rerate Radish, Cleveland, White, and, even, Dotseth more harshly than had been done during July and to buttress a defense that their selection had naturally resulted from adverse ratings in the nine categories on that September form.

Such a conclusion is reinforced by another factor: the identities of Bays 1 and 2 assessors. So far as the record discloses, never prior to September had Respondent chosen to have leadmen rate production employees. The ratings on past annual evaluations had been made by Gruling, at least while he had been employed as plant superintendent during 1998 and prior years. Yet, had he prepared the September assessments, and given the low ratings to the four discriminatees which are described in section I.E., above, Respondent would have confronted inconsistencies between assessments and evaluations. Gruling would have been forced to try to explain those inconsistencies. That could be avoided by having someone else—even nonsupervisory personnel, such as leadmen—prepare the assessment ratings. Even were it to be argued that such a conclusion partakes of speculation to some extent, given the evidence presented it is the only logical inference available for a change from seemingly past ratings practice. Having leadmen prepare the September ratings allowed Respondent to advance a defense uncluttered by previous ratings made by those leadmen.

Nonetheless, Vandre and Gumz did not do a very reliable job of rating Bays 1 and 2 production employees. As described in section I.E, above, there were inconsistencies between some of their ratings and those made less than 3 months earlier by Gruling. There were ratings-inconsistencies between employees in the same bay in the same categories. There were inconsistencies between ratings and Respondent's records, such as for attendance. Respondent apparently tried to escape the latter by claiming that Vandre and Gumz, at least, had not bothered to look at any records when preparing their assessments. Yet, that is not so acceptable an explanation as Respondent seeks to have accepted.

To accept Respondent's overall defense, there had been a decision to take an unprecedented action: in the face of adverse business conditions, to select production employees for layoff due to a purported lack of work. Entirely new forms were prepared to implement that supposed decision. Those forms were filled out, both rating and ranking employees. Simple logic would dictate that, against such a background, at least minimal care would have been exercised by assessors, as well as reviewers, to ensure that thoughtful ratings and rankings were made. But, the process was implemented with seemingly scant thoughtfulness. Vandre and Gumz spent little time completing their assessments. They looked at no records whatsoever when preparing them. When pressed for explanations of particular ratings, neither one was able to provide responsive and logical ones. In consequence, after having seemingly great care had been taken to design a rating and ranking process, its implementation was almost cavalier, leaving an impression that implementation was more result-oriented, than legitimately motivated.

In sum, the General Counsel has shown that animus toward their union activities had motivated selection of Radish, Cleveland, White, and Dotseth for permanent layoff on September 22. Respondent has failed to credibly show that production employees, in general, and those four production employees, in particular, would have been permanently laid off on September 22 had there been no prior campaign by the Union and involvement in it by those four discriminatees. Given those conclusions, and viewing the evidence in its totality, I conclude that a preponderance of the credible evidence establishes that Respondent had been unlawfully motivated in selecting Radish, Cleveland, White, and Dotseth for permanent layoff on September 22, thereby violating Sections 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

Merrill Iron and Steel, Inc., has committed unfair labor practices affecting commerce by permanently laying off Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., and Ronald G. Dotseth because of their support for and activities on behalf of United Paperworkers International Union, AFL–CIO and to discourage such activities in the future by employees, in violation of Section 8(a)(3) and (1) of the Act; and, by threatening an employee that it intended to terminate another employees because the latter was a union organizer and wanted to become union president should employees chose to become represented, in violation of Section 8(a)(1) of the Act.

REMEDY

Having concluded that Merrill Iron and Steel, Inc., has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, to take certain affirmative actions to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., and Ronald G. Dotseth full reinstatement to the positions which each of them held before being discriminatorily laid off on September 22, 1998, dismissing, if necessary, anyone who may have been hired or assigned to perform their jobs, or, if any of their jobs no longer exists, to substantially equivalent employment, without prejudice to seniority or other rights or privileges.

Furthermore, within 14 days from the date of this Order, it shall remove from its files any references to the unlawful permanent layoffs of Radish, White, Cleveland, and Dotseth on September 22, 1998, and, within 3 days thereafter, it shall notify each of those employees in writing that that has been done and that their permanent layoffs will not be used against any of them in any way.

In addition, it shall be ordered to make Radish, White, Cleveland and Dotseth whole for any loss of earnings and other benefits suffered as a result of the discrimination directed against them, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Merrill Iron and Steel, Inc., Schofield, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently laying off, discharging, or otherwise discriminating against Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., or Ronald G. Dotseth, or against any other employee, because of support for or activities on behalf of United Paperworkers International Union, AFL–CIO, or any other labor organization, or to discourage employees from extending such support or engaging in such activities in the future.

(b) Threatening to terminate employees because of their union activities or anticipated union activities.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by the National Labor Relations Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., and Ronald G. Dotseth full reinstatement to each one's former position or, if one or more of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges.

(b) Make Radish, White, Cleveland, and Dotseth whole for any loss or earnings and other benefits suffered as a result of the discrimination against each of them, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful permanent layoffs of Radish, White, Cleveland, and Dotseth on September 22, 1998, and within 3 days thereafter notify each one of them in writing that this has been done and that those permanent layoffs will not be used against any of them in any way.

(e) Within 14 days after service by the Region, post at its Schofield, Wisconsin facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Merrill Iron and Steel, Inc., and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Merrill Iron and Steel, Inc. has gone out of business or closed its Schofield facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the Schofield facility at any time since May 5, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to terminate employees because of support for or activities on behalf of United Paperworkers International Union, AFL–CIO, or any other union, not because we believe that employees may engage in such support or activities.

WE WILL NOT permanently lay off, discharge, or otherwise discriminate against Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., Ronald G. Dotseth, or any other employee because of support for or activity on behalf of the above-named union, or any other union, nor to discourage such support or activities in the future.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights guaranteed by the National Labor Relations Act.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Order, offer Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., and Ronald G. Dotseth full reinstatement to their former jobs or, if one or more of those jobs no longer exist, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges that would have been enjoyed had we not unlawfully discriminated against them.

WE WILL make Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., and Ronald G. Dotseth whole for any loss of earnings and other benefits resulting from our discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Order, remove from our files any reference to the unlawful permanent layoffs of Jeff Radish, Michael L. White Sr., Clifford Cleveland Sr., and Ronald G. Dotseth, and WE WILL, within 3 days thereafter, notify each one in writing that this has been done and that our unlawful action will not be used against him in any way.

MERRILL IRON AND STEEL, INC.